81-22-66

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK TUROSO, LAURA SPIKER,
DALENE BURGUN, WILLIAM LEE,

Petitioners,

—v.—

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, THE HONORABLE RICHARD M. BRENNEN, THE HONORABLE FRANK O'BELL, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 80-3696, 3728, 3742, 3743, 3817 and 81-3127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK TUROSO,
Petitioner-Appellee (80-3742/3),
Petitioner-Appellant (80-3696),

LAURA SPIKER,
Petitioner-Appellee (80-3728),

DALENE BURGUN,
Petitioner-Appellant (80-3817),

WILLIAM LEE,
Petitioner-Appellee (81-3127),

v.

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, RICHARD M. BRENNAN, FRANK O'BELL and WILLIAM J. BROWN,
Respondents-Appellees (80-3696) (80-3817),
Respondents-Appellants (80-3728, 3742, 3743 and 81-3127).

APPEAL from the United States District for the Northern District of Ohio.

Decided and Filed February 4, 1982.

Before: ENGEL and MERRITT, Circuit Judges and HOGAN, District Judge.*

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* Hon. Timothy S. Hogan, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ENGEL, Circuit Judge, delivered the opinion of the court, in which HOGAN, District Judge, joined. MERRITT, Circuit Judge (pp. 19-23), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. In these six consolidated appeals, four habeas corpus petitioners assert that their convictions were invalid because the Ohio obscenity statute under which they were charged is constitutionally overbroad and vague. It is vague, they claim, because its language is confusing and fails to apprise them and others of what conduct is proscribed by the statute. It is overbroad, they claim, because it proscribes conduct which is protected expression under the First and Fourteenth Amendments.

We are presented in these appeals with no other issues, although others were raised in direct appeals to Ohio's appellate courts, and in the petitions filed in the district courts pursuant to 28 U.S.C. § 2254.

Although each appeal reaches us in a somewhat different posture, each has certain aspects in common with the others. All petitioners were found guilty of a violation of Ohio's pandering statute, Ohio Rev. Code § 2907.32, following jury trials in the Cleveland Municipal Court. Those trials took place before the Supreme Court of Ohio determined that the Ohio statute was neither overbroad nor vague when read in *pari materia* with the requirements of *Miller* v. *California*, 413 U.S. 15 (1973). *See State* v. *Ronald Burgun, et al.*, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978).[1] Nonetheless, the trial judge in each trial instructed the jury by reciting the provision of Ohio Rev. Code § 2907.01(F), defining "obscene" material or performance, and also by reciting the three basic guidelines in obscenity cases as set forth in *Miller*.

All petitioners requested habeas relief following various

[1] Ronald Burgun is not to be confused with one petitioner here, Dalene Burgun (No. 80-3817). One of the petitioners before us today had his state appeal considered by the Supreme Court of Ohio as a companion case to *Burgun*. Appeal No.80-3743 (Turoso I).

appeals in the state court system. Habeas relief was granted in four cases and was denied in two cases. Of the four judges of the United States District Court for the Northern District of Ohio considering the issue, two judges (District Judges John M. Manos and Ann Aldrich) concluded that the statute was both overbroad and vague, and two judges (Chief Judge Frank Battisti and Senior District Judge William K. Thomas) concluded that the statute was constitutionally valid. The contrary views are set forth in two extensive opinions written by Judge Manos,[2] holding the statute invalid, and in extensive but unpublished opinion filed by Senior Judge Thomas upholding the statute. *Turoso* v. *Cleveland Municipal Court*, No. C79-1010 (N.D. Ohio September 15, 1980), Appeal No. 3696 (Turoso III).

In *Ward* v. *Illinois*, 431 U.S. 767 (1976), the Supreme Court found that state courts may "authoritatively construe" an otherwise defective statute to conform to the *Miller* requirements. Following the guidance of *Ward*, another panel of this court, of which the writer of this opinion was also a member, has thus specifically upheld the statute in response to claims of facial invalidity due to overbreadth and vagueness. *Sovereign News Co.* v. *Falke*, — F.2d — (6th Cir. 1981). The panel found that any infirmities which may exist in the statutory language have been cured by the Ohio Supreme Court's incorporation of the *Miller* guidelines and examples in *Burgun*, *supra*. This holding would appear to lay to rest the issues framed in these appeals as well, since they are similarly limited to questions of constitutional infirmity of the statute as a whole. However, the decision in *Sovereign* addresses itself only to declaratory and injunctive relief under 42 U.S.C. § 1983 against anticipated but largely unrealized injury. Because these appeals arise in the setting of habeas

[2] One opinion was published and one was not. *See Sovereign News* v. *Falke*, No. C77-230 (N.D. Ohio, September 19, 1980) ("Sovereign II"); *Sovereign News* v. *Falke*, 448 F.Supp. 306 (N.D. Ohio 1977) ("Sovereign I").

corpus relief sought after actual conviction for violation of the statute, we discuss the subject more specifically here to highlight problems peculiar to actual prosecutions.

I.

Section 2907 of the Ohio Revised Code deals with three categories of sex-related crimes: sexual assaults and displays (Ohio Rev. Code §§ 2907.02-2907.09); prostitution offenses (Ohio Rev. Code §§ 2907.21-2907.27); and offenses related to the dissemination of obscenity and matter harmful to juveniles (Ohio Rev. Code §§ 2907.31-2907.37).

The four habeas petitioners here were each charged with violation of Ohio Rev. Code § 2907.32(A).[3] Petitioners Lee

[3] Ohio Rev. Code § 2907.32(A) provides in relevant part:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> (1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;
>
> (2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;
>
> (3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;
>
> (4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;
>
> (5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.
>
> (B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.
>
> (C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

and Spiker were charged with violation of section 2907.32(A)(4), while petitioners Burgun and Turoso were charged with violating Ohio Rev. Code § 2907.32(A)(2).

The actual instructions given by the state trial judge in each of the underlying state prosecutions leave much to be desired by way of clarity, but it is fair to observe that in each case the jury was instructed as to the basic elements of the crime under which the particular petitioner was charged under Ohio Rev. Code § 2907.32. The jury was further read the specific definitions of "obscene material or performance," as contained in Ohio Rev. Code § 2907.01(F). The jury was also instructed that to convict the particular defendant it must find that the particular material or performance meets the three guidelines of *Miller*:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts in a patently offensive way, *sexual conduct specifically defined by the applicable state law*; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. *California*, *supra*, 413 U.S. at 24 (emphasis added).

The so-called "*Miller* examples" were not included by any of the trial court judges in their instructions as illustrations of specific sexual conduct.[4] Ohio Rev. Code § 2907.01 specifically defines "sexual conduct."

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[4] In addition to the three guidelines set forth by *Miller*, that decision, while not endeavoring to limit otherwise what conduct might be specifically defined by state law as "sexual," gave two permissible "examples":

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations of masturbation, excretory functions and lewd exhibitions of the genitals.

Miller v. *California*, 413 U.S. 15, 25 (1973).

As used in section 2907.01 to 2907.37 of the Revised Code:

> (A) "Sexual conduct" means vaginal intercourse between a male and a female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

However, the respective juries received instructions including this definition in only two appeals, Appeal No. 80-3817 (Dalene Burgun) and Appeal No. 81-3127 (William Lee). Thus, although the juries were told that they were to find "sexual conduct specifically defined by state law," they were given no such specific definitions in four of six cases. Appeal No. 80-3743 (Turoso I); Appeal No. 80-3742 (Turoso II); Appeal No. 80-3796 (Turoso III); Appeal No. 80-3728 (Laura Spiker).

II.

A certain amount of obfuscation, in our opinion unnecessary, has arisen, but this is due neither to the statute itself nor to the language of *Burgun* as contained in its syllabus. Rather, confusion arises from the body of the opinion in *Burgun* and from the jury instructions, which were impliedly approved by the affirmances of the appeals involved in *Burgun*.[5] There appears to have been a tendency in the jury instructions, both in the underlying state criminal trials here

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[5] The rule in Ohio is that the precedent in each case is to be found in the syllabus rather than in the text of the opinion. This rule has existed in some form for over 100 years. Rule VI, *Ohio S. Ct. Rule of Practice* provides:

> A syllabus of the points decided by the Court, in each cause, shall be stated in writing by the Judge assigned to prepare the opinion of the Court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the Court.

94 Ohio St. ix (1916). Following citation of the rule, the Reporter for the Court indicated:

> On page iii of 6 Ohio State the reporter made the announce-

and in *Burgun*, to focus on the definition of "obscene" in subsection (F), without mention of the definition of "sexual conduct" in subsection (A). Indeed, the instructions to the jury in appeal No. 80-3742 (Turoso II) expressly refer to the "sexual conduct" requirement of the *Miller* guidelines as being that which the trial judge had just read from subsection (F). This misplaced emphasis could engender confusion. Those federal district judges who granted habeas relief could well have considered those instructions as an indication that the Ohio statute remained vague and overbroad, despite the Ohio Supreme Court's alleged attempt to "authoritatively construe" it in a manner consistent with *Miller*.

Petitioners argue that the statute is vague and overbroad because of, rather than despite, the many specific definitions in the statute. The definition of "sexual conduct" in section 2907.01(A), *see ante* at 6, is only the first of many definitions included in section 2907.01. The others are:

> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is

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ment, under date of August, 1857, but not as a rule adopted by the court:

> "The Judges desire it to be understood that their concurrence in the opinion of the judge who announces the decision of the Court is limited to that part which was necessary for the determination of the case upon the facts, and the points of law arising therefrom; and, in general, the judges have endeavored to state those points in the syllabus of each case."

In the same announcement it is stated that volume 6 Ohio State reports was published before volume 5.
In volume 5, beginning on page iii, certain rules of court were adopted by the "Judges of the Supreme Court, *in the month of January, 1858*, pursuant to the provisions of the 601st section of the Code of Civil Procedure," included in which rules is the present Rule VI, that the syllabus states the points of law decided.

We thus refer to the syllabus of the opinion rather than its body in evaluating the Ohio Supreme Court's construction of the obscenity statute. For an interesting discussion of the syllabus rule, see *The True Story of the Ohio Syllabus Rule*, [1980] Y.B. 21 (Supreme Ct. Historical Soc'y).

a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults [sic]. Or, if it is designed for sexual deviates or other specially susceptible group,

judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by display or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

The heart of petitioners' argument is that, when obscenity is defined only with reference to subsection (F), the statute is capable of an unconstitutional application. For example, they claim the statute, as "authoritatively construed" would permit prosecutions for simple nudity,[6] as coming within the definition of obscene matter under subsection (F)(2), or it would permit prosecution for depicting "extreme or bizarre violence" under subsection (F)(5), neither of which alone complies with the restrictions in *Miller*. Petitioners assert that, because the five subsections of subsection (F) are written in the disjunctive, there is no tie-in with the other subsubsections. Thus, a jury instructed in the way condoned in *Burgun* could find that the defendants were guilty as charged, even though it might not have believed that the material or performance involved met the tests of *Miller*.[7]

These claims have superficial appeal. However, it is unreasonable to consider only discrete sections of the statute in

[6] This fear is exaggerated. The Ohio courts have recognized that nudity *per se* is not obscene. *See, e.g., City of Cincinnati* v. *Walton*, 76 Ohio Law Abs. 162, 3 Ohio Ops. 2d 252, 145 N.E.2d 407 (1957); *State of Ohio* v. *Lerner*, 51 Ohio Law Abs. 321, 81 N.E. 282 (Hamilton County Common Pleas 1948).

[7] Alternatively, a jury discerning from the instructions that nudity is "sexual conduct" could find that the *Miller* test is satisfied if it views nudity as patently offensive and without redeeming value.

order to determine its validity. The statute must be read in its entirety and, as the Ohio Supreme Court so obviously intended, in *pari materia* with *Miller*.[8] Such a reading discloses that subsection (F) is but one of several requirements necessary to sustain a conviction. In addition to meeting one or more of the five requirements of section 2907.01(F), material must also depict or describe sexual conduct, contact, or activity within the meaning of section 2907.01(A)-(C).

Alternatively, the material at issue must both satisfy one or more of the definitions of section (F) and comport with one of the *Miller* examples in order to satisfy *Miller*. Although no jury in the underlying state criminal proceedings here was advised that specific sexual conduct included the *Miller* examples, the Supreme Court of Ohio appears to have construed the former and nearly identical obscenity statute to

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[8] In our view, Judge Merritt's dissent completely misses the point of the majority decision here, in *Sovereign News* v. *Falke*, *supra*, and in the Ohio Supreme Court's decision in *Burgun*. That is, of course, that the First Amendment continues to protect expression in Ohio unless it falls within the permissible limits of *Miller* v. *California*. Judge Merritt's unhappiness, therefore, is of necessity with *Miller*. It has to be manifestly clear that whatever "conduct" the Ohio statute proscribes must perforce come within *Miller* or it is protected.

Judge Merritt's speculations concerning the fate of great works of art in Europe, under Ohio's statute are therefore without basis. Meanwhile, back in the Cleveland Municipal Court, the battle bears faint resemblance to that fought in the dissent. According to the evidence in *Turoso I*, for example, the following is part of an unchallenged description of an 8 mm. film which incurred the charges and brought about the conviction complained of in that appeal:

> [P]articipants are two males and two females. One of the females is committing fellatio on the two males at the same time. [The movie] then shows the two males jacking off and the female lying down in front of them licking her lips. After a time one of the males ejaculates into her mouth and on the chin. The other female then licks the chin and kisses the above mentioned female. She then commits fellatio on the male that hasn't ejaculated yet. While she is doing this the other males and female and [sic] playing with her vagina. The female then commits cunnilingus on her. Then the other male ejaculates into the mouth of the female. The two females then kiss and embrace again.
>
> Appeal No. 80-3743 (Turoso I), Joint Appendix at 22.

encompass the *Miller* examples. *See State ex rel Keating* v. *Vixen*, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973).[9] Moreover, the published order of affirmance by our court in *Sovereign News*, *supra*, recognizes that those examples were adopted by reference in *Burgun*, a conclusion reached as well by Judge Thomas in his opinion in appeal No. 80-3696 (Turoso III).

As a result, a potential defendant has definite standards by which he can evaluate any material at issue. For example, one who finds himself charged with pandering obscenity by selling obscene material will first read section 2907.32(A)(2) for the essential elements of the offense. He can then refer to section 2907.01 for a definition of "obscene," or of any other term with a specific meaning under the statute. Knowing also that the Ohio Supreme Court has construed the statute as incorporating the guidelines of *Miller* v. *California*, he will know its three requirements must be proved *in addition* to the elements of obscenity listed in section 2907.01(F). Therefore, under the statute "as written and authoritatively

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[9] The former statute provided that:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

Section 2905.34(A) Ohio Rev. Code (1970) (current version at section 2907.01(F) Ohio Rev. Code (1974)).

construed," it is incumbent upon the prosecution to prove beyond a reasonable doubt that:

(a) The material depicts conduct which is sexual; that is, it depicts vaginal intercourse or any of the other explicit examples expressly set forth in the definition of sexual conduct in section 2907.01(A), or one of the two examples of such conduct as described in *Miller;*

(b) the sexual conduct depicted is obscene, as that term is expressly defined in section 2907.01(F)(1)-(5); *and*

(c) the material meets the three guidelines of *Miller,* in that (1) when taken as a whole and applying contemporary community standards, it appeals to the prurient interests of the average person; (2) it depicts or describes, in a patently offensive way, the sexual conduct specifically defined in section 2907.01(A) or in the examples of *Miller*; and (3) taken as a whole, it lacks serious literary, artistic, political, or scientific value.

The foregoing seems to us the most logical, natural and also literal construction of the Ohio statute, construed *in pari materia* with *Miller*. It is true that, taken alone, certain of the disjunctive definitions of "obscene" in section 2907.01(F) may appear to apply only to protected activity, such as simple nudity and violence. Similarly, it is possible that a reading of both *Miller* and the statute creates redundancies and surplusage. This result can be avoided in each particular case with careful jury instructions. More important, it is not for our court to determine that a better statute could be devised. Rather, it is our function to follow the Supreme Court's finding that state statutes dealing with obscenity can be upheld where their authoritative judicial construction has made them conform to *Miller*. *Miller, supra,* 413 U.S. at 24, n.8, 25; *Ward* v. *Illinois,* 431 U.S. 767 (1977). Defendants can deter-

mine that the material must depict explicit sexual conduct as defined in the statute, that the sexual conduct must also meet one or more of the definitions of "obscene" in the Ohio statute, and that all three of the *Miller* guidelines must be met in order to convict him. Thus, there can be no prosecution for simple nudity, nor for violence or bizarre conduct alone. As a result, there can be no claim of overbreadth on that account, nor is the statute vague as leaving uncertainty.

III.

As we have mentioned earlier, the instructions given in the underlying criminal prosecutions in the Cleveland Municipal Court varied in their form from that outlined above. All included a reading of the entire definition of "obscene" contained in section 2907.01(F); however, only two included a reading of the definition of "sexual conduct" contained in section 2907.01(A). None included the *Miller* examples.

In no case is it claimed that the particular material or performance did not, in fact, depict sexual conduct specifically included in the statutory definition. In fact, there is no claim that such an instruction (or indeed any other definition which the particular case might appear to make desirable) was requested and refused. It is obvious to us that if a jury is advised that material must depict sexual conduct "specifically defined by applicable state law," good sense suggests that the specific definition be given. It is also apparent that if confusion existed, it was wholly avoidable by a straightforward application of the statute and of *Miller*. If such confusion had been seen as prejudicial by the defendants in the criminal proceedings, it could easily have been corrected or could have been made the subject of appropriate objection on appeal within the state system. It seems equally clear to us, from the graphic descriptions of the material involved, that these cases concern what is commonly known as hard core pornographical material. It so obviously fits within the appropriate

definitions of "obscene materials" that any further or more explicit definitions could only have reinforced the likelihood of conviction. It is thus difficult to believe that any failure to object or to raise such issues before us was an oversight. Obviously, the petitioners here have realized that their best, and probably only effective, defense lay in persuading the courts that the statute was altoghether void. Anything short of that finding would at best lead to a grant of a conditional writ, retrial under even less favorable but completely lawful instructions, and, once more, convictions.

In his written opinion filed in the appeal of Frank Turoso, Appeal No. 80-3696 (Turoso III), United States District Judge William K. Thomas noted that the jury instruction involved therein included neither the *Miller* "examples" nor the definition of "sexual conduct" of section 2907.01(A). *Turoso, supra*, C79-1010 at 21. Judge Thomas' observations explain both the nature of the problems in these appeals and the reason why they do not reach constitutional proportions. He indicates further that omissions in the jury instructions do not require holding the entire statute unconstitutional, the sole legal ruling sought here:

> In his recommended report, the magistrate noted that the court (Judge Calandara) did not define sexual conduct in terms of the two examples in *Miller*, at p.25, nor did the court define sexual conduct as it appears in Ohio Revised Code § 2907.01(A). The magistrate then concluded:
>
> > Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. *Sovereign News Co., supra*, at p. 400.
>
> Thereupon he recommended that the petition for a writ of habeas corpus be granted.
>
> Immediately before Judge Calandra gave his general instructions to the jury, he informed defense counsel that

he would "charge the jury on the *Miller* case and the *Smith* case and the *Burgen (sic)* case." As the quoted portions of Judge Calandra's instructions indicate, he gave the jury the *Miller* guidelines. Following the completion of the general instructions, there was a discussion at the bench about several matters. At that time, defense counsel did not ask the judge to add the *Miller* "examples" to the court's instructions on the *Miller* guidelines. Thus defendant did not ask the court to give to the jury the *Miller* "examples." Moreover, defendant did not object to the giving of the *Miller* guidelines without the *Miller* "examples."

In *Henderson* v. *Kibbe*, 431 U.S. 145, 154-55, (1977), the Court reversed a decision of the Second Circuit wherein a divided panel had granted a state prisoner's petition for habeas corpus on the ground that a New York state trial judge's failure to instruct the jury on the issue of causation was constitutional error. The Court observed:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The Court further noted that "an omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." The Court announced the rule that is controlling here:

> The burden of demonstrating that an erroneous instructing was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected

> the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U.S. at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

Id., at 146.

> This controlling rule of federal habeas corpus law differs from the magistrate's recommended ruling, isolating, as he did, the judge's instructions from the rest of the trial and determining that the court's instructions were unconstitutionally incomplete. However, the question in this federal habeas corpus proceeding is not whether Judge Calandra's instruction to the jury, *sans* a definition of "sexual conduct" in terms of the two examples in *Miller*, at p.25, nor ". . . as it appears in O.R.C. 2907.01 (A)," rendered the "instructions . . . unconstitutionally overbroad." The question rather is whether the instruction without such definition of sexual conduct "so infected the entire trial that the resulting conviction violates due process."

Id. at 21-23.

The foregoing comments apply with equal force to each of the appeals consolidated here, and no effort is made by the parties to assert any meaningful distinction between them individually. There is no evidence in petitioners' briefs or the records below that any trial was so tainted by a failure to instruct properly that due process was violated. Thus, habeas relief is unwarranted. *See Long* v. *Smith, Superintendent*, 80-3057 at 10-11 (6th Cir. October 21, 1981).

IV.

The Ohio Supreme Court has authoritatively construed the statute to comport with the *Miller* requirements. It has thus made clear its commitment to the protection of First Amendment expression. Petitioners assert that the court's authoritative construction" of the obscenity statute falls short of meet-

ing the *Miller* standards, offering as evidence both the implicit approval of potentially defective jury instructions in *Burgun, supra,* and the alleged insensitivity to the *Miller* requirements in *State ex rel Keating* v. *Vixen,* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973).

It is sufficient for us to observe in closing what was recognized in *Miller*:

> If a state law that regulates obscene material is [limited to conform with *Miller* requirements], as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of Constitutional claims when necessary.

Miller, supra, 413 U.S. at 25. Although we may agree with the dissent that the language in *Vixen, supra,* is disturbing, that case is obviously not before us here. We have never conceived that a federal court's responsibility to protect freedom of expression under the First Amendment is discharged by mere lip service to any rule, however artfully crafted.

The judgments in appeals No. 80-3696 and 80-3817 are affirmed. The judgments in appeals No. 80-3743, 80-3742, 81-3127 and 80-3728 are reversed.

MERRITT, Circuit Judge, dissenting. I agree with District Judges Manos and Aldrich that the Ohio obscenity statute is unconstitutional. Our Court treats this as just another criminal statutory construction case and tries to perform radical surgery on the statute in order to save it and the state convictions based on it. But this is a statute outlawing speech and artistic expression; it requires a more sensitive reading of the First Amendment than our Court has given. Unlike the relatively healthy state statute saved in *Ward* v. *Illinois* by insertion of a *Miller* pacemaker, the heart of the Ohio statute in question here is malignant. A *Miller* pacemaker will not regulate it. If our Court's opinion stands as the law of obscenity, then all state obscenity statutes will be upheld as valid, no matter how broadly or specifically they censor protected speech, so long as the *Miller* standards are repeated to the jurors after they are instructed to apply the unconstitutional statute.

The Illinois statute in *Ward* was a general, single-shot provision outlawing material when "its predominant appeal is to prurient interest." The Ohio statute has more than thirty specific sections and subsections that cover the waterfront. The heart of the statute is section E with seven subsections and section F with five. Section E, relating to juvenile material, covers everything from "bizarre violence," "foul language," "physical torture" and "death" to "nudity" and "sexual excitement." Under Section F, and the jury instructions approved by our Court today, a defendant can be convicted of pandering adult obscenity and go to jail, for displaying or depicting "[1] sexual excitement or [2] nudity in a way which tends to represent human beings as mere objects of sexual appetite . . . [or 3] bestiality or [4] extreme or bizarre violence, cruelty or brutality . . . or [5] depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities . . . ." Ohio Rev. Code § 2907.01(F). "Bestiality" and other similar ideas are not

defined but obscene "nudity" consists of "showing . . . [1] male or female genitals, [2] pubic area, or [3] buttocks with less than a full, opaque covering or, [4] of a female breast with less than a full opaque covering of any portion thereof below the top of the nipple . . . ." Ohio Rev. Code § 2907.01(H). These provisions are the heart of the statute.

Under the statutory scheme and jury instructions approved by us today, Phidias and Praxiteles would be condemned not to a cup of hemlock, along with Socrates, but to languish in an Ohio jail along with the creators of most Greek statues of Aphrodite, Hermes, Apollo and the Satyrs. For these sculptors "displayed" genitals, buttocks and female breasts "below the top of the nipple" "with less than a full, opaque covering." The Parthenon frieze of Phidias has for over 2500 years withstood wind and storm and bombings and invasions by Persians, Spartans, Romans, Ottoman Turks and German artillery, but its marble nudity and magnificent depiction of "bizarre violence" could not withstand the onslaught of the righteous of Ohio. Michelangelo's ceiling twenty centuries later in the Sistine Chapel would now have to come down for the larger-than-life genitals and buttocks of Adam are clearly "displayed" as God reaches out his finger to instill life in the first man. The creation could not have taken place in Ohio.

Moreover, since relieving oneself of body fluid is also "obscene" in Ohio, the creator of the famous sculpture of the little boy in Brussels, who performs for all to see function #1 in a pond, would unfortunately have to go to jail, and the little boy of bronze, in order to escape the sledge hammer of the godly, would have to place over his genital region not merely a fig leaf but nothing less than a "full opaque covering." The Pope would even have to remove from Ohio the Vatican Museum with its many fearsome statues, friezes and pictures showing "bestial" and "bizarre" battles of an extremely violent nature between animals and animal-like humans.

If you believe that all this is a dissenter's exaggeration and that the authorities in Ohio would not really countenance under this statute the suppression of such works of art, I admonish you to read *State of Ohio ex rel. Keating* v. *"Vixen,"* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973), the response of the Ohio Supreme Court to the action of the United States Supreme Court, 413 U.S. 905 (1973), vacating the state court's earlier decision in 27 Ohio St.2d 278 (1971), in light of *Miller*. The state court, purporting to apply post-*Miller* standards, finds the film in question obscene under the statute after describing it as follows:

> The principal character, Vixen, is a buxom young wife, whose 'square' husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism and airplane hijacking. *It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.* (Emphasis added.)

272 N.E.2d at 139. Although this movie may not be a work

of art, it is far from hard core pornography.[1] On the next page of the opinion, the Ohio Supreme Court explains that just one sex scene would make even "The Sound of Music" obscene and subject to prior injunctive restraint:

> Assume, hypothetically that the main character in 'The Sound of Music' performs during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an 'eye on the recent Supreme Court rulings?' The question supplies its own answer.

In the end, however, the situation is not touched with much humor. Books are being confiscated and people going to jail for speech under a statutory scheme that clearly and patently contravenes the First Amendment. As District Judges Manos and Aldrich state so cogently, all the Supreme Court of Ohio has done is simply add the *Miller* standards as a new, alternative method of sending people to prison while leaving in effect alongside it the old unconstitutional method outlawing graphic expression of "sexual excitement," "nudity," "bizarre violence" and "human bodily functions." It is impossible to tell in these cases whether the jury convicted and the Ohio courts imprisoned the defendants because they violated the old unconstitutional statutory provisions or the new *Miller* standards. The juries in these cases were given all of the alternatives in the disjunctive and were not required to state which of the several standards they applied.

Our system of criminal justice cannot live with the underlying principle enunciated today in this case by our Court: a man's conviction for speech is valid under a patently unconstitutional law so long as the state could, theoretically, have repealed the old law and drafted another, more narrow,

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[1] In *Miller*, the court said: "Under the holdings announced today, no one will be subject to prosecution for . . . obscene materials unless these materials depict or describe patently offensive 'hardcore' sexual conduct specifically defined . . . ." 413 U.S. at 27.

valid statute that proscribes the same speech. Our system cannot live with this principle because it violates due process and creates the offense ex post facto. The opinion of the court also violates principles of federalism. We have the authority to review and declare invalid state laws which abridge the First Amendment, but we are not authorized to repeal their statutes and reenact them to suit ourselves. And even more to the point, if we are going to presume to enact new laws for the states rather than simply review judicially the ones they have, we should at least enact valid laws for them. The one we have pieced together here still outlaws nudity, bizarre violence, foul language, torture, death and the "glorification" of sex and many other materials protected by the First Amendment. It violates the basic principle laid down in *Cohen* v. *California*, 403 U.S. 15, 26 (1971) that the First Amendment protects the "emotive function" as well as "cognitive content" and the principle that First Amendment protection of artistic materials is "not lessened by the fact that they are designed to entertain as well as inform." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-442
	)	
Petitioner,	)	JUDGE JOHN M.
	)	MANOS
v.	)	
	)	
CLEVELAND MUNICIPAL	)	O R D E R
COURT, et al.,	)	[Entered Oct. 6,
	)	1980]
Respondents.	)	

The petitioner, Frank Turoso, filed his petition in this court for a writ of habeas corpus challenging his conviction and sentence for pandering obscenity, under O.R.C. §2907.32. That conviction was entered on July 13, 1976 by the Cleveland Municipal Court, Cuyahoga County, and was affirmed by the Eighth District Court of Appeals in a decision announced February 8, 1979. No appeal was taken to the Ohio Supreme Court.

To entertain a petition for a writ of

habeas corpus, the District Court must determine, first, that the petitioner is in custody, 28 U.S.C. §§2241(c)(1), and 2254(a); and second, that he has exhausted all his available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 882 (1963); Wilwording v. Swenson, 404 U.S. 429, 92 S.Ct. 409 (1971).

In Hensley v. Municipal Court, 411 U.S. 343, 93 S.Ct. 1571 (1973) the court held that one released on personal recognizance pending execution of a sentence is in custody for purposes of habeas corpus relief.

With regard to the requirement that the petitioner exhaust his state remedies, the Sixth Circuit in Lucas v. People State of Michigan, 420 F.2d 259 (6th Cir. 1970), held that if the state appeals courts have ruled contrary to the claims of constitutional violations raised by the habeas corpus petition, and it appears probable that they will

adhere to their previous rulings, futile appeals will not be required. The exhaustion of state remedies does not necessitate appeals which are clearly futile. See Coleman v. Maxwell, 351 F.2d 285 (6th Cir.); Keener v. Ridenour, 594 F.2d 581 (6th Cir. 1979); Collins v. Perini, 448 F.Supp. 1006 (N.D. Ohio 1978).

In contradistinction to the decision of this court in Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), the Supreme Court of Ohio found the Ohio obscenity statute, Ohio Revised Code §2907.32, to be constitutionally unassailable. State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978). Moreover, the court affirmed its Burgun holding in a per curium opinion handed down one year later. State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). This court is persuaded that the Supreme Court of

Ohio will not reverse its position regarding the constitutionality of Ohio Revised Code §2907.32. There being no requirement that the petitioner engage in a "judicial runaround," Lucas, supra at 262, the court finds that the petitioner is in custody and that he has exhausted all available state remedies.

Deciding that both jurisdictional prerequisites have been met, the court next considers the merits of the petitioner's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims the statute is constitutionally infirm in violation of his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbraod and does not meet the test of

constitutionality announced in Miller v. California, 413 U.S. 15, 93 S.Ct 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978), and State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). Notwithstanding this court's holding in Sovereign News delcaring the statute unconstitutional, the Ohio State Supreme Court in Burgun attempted to rewrite by judicial gloss

and intricate statutory interpretation the statute enacted by the legislature.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated through judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977).

The petition for writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

OPINION OF THE DISTRICT COURT IN
SOVEREIGN CO. v. FALKE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY,	)	CASE NO. C77-230
	)	
	)	JUDGE JOHN M.
Plaintiff,	)	MANOS
	)	
v.	)	MEMORANDUM OF
	)	OPINION
LEE C. FALKE,	)	[Entered September
et al.,	)	19, 1980]
	)	
Defendants.	)	

This court decided this matter for the first time on October 31, 1977. Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977). The procedural history, id. at pp. 316-328, and legal opinion, id. at pp. 329-408, are set out in detail in that opinion and will not be restated here. Suffice to say that this court found, inter alia, that substantial portions of the Ohio obscenity statute, Ohio Revised Code §§2907.01(F) and 2907.32 were constitutionally infirm

for overbreadth and vagueness. Id. at pp. 390 et seq. Many of the parties appealed this court's decision. While the matter was pending on appeal, the Ohio Supreme Court, in contradistinction from the view expressed by this Court, found the very same statute to be constitutionally unassailable. State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978).

Thereafter, the United States Court of Appeals for the Sixth Circuit remanded the matter to this court for further consideration in the light of that intervening state court decision. Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979). Certiorari to the United States Supreme Court was sought and denied. The matter is, therefore, for the second time, before this court for disposition.

After a careful examination of the Burgun decision, this court remains

unpersuaded that the Ohio Supreme Court, either in its holding, or its reasoning, has ameliorated, in any respect, the constitutional defects in the statute, previously identified in this court's earlier opinion. Indeed, the confusion created by that opinion, when engrafted upon the statute as an authoritative interpretation of the State of Ohio's highest tribunal, expands the defects in the statute to such an extent that this court, in fulfilling its obligation to protect the Federal Constitution, is compelled to strike down this law because of, rather than despite, the interpretation of Ohio's court of last resort. The reasons for this court's decision follow.

The litmus test for determining the constitutionality of any state law which makes criminal the distribution

of "obscene" materials appears in the Supreme Court's decision in Miller v. California, 431 U.S. 15 (1973).

> "[W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary artistic, political or scientific value."
>
> "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id., at 24 (footnote and citations omitted).

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law as written or construed." Id., at 27.

The Miller decision mandates that a state obscenity law be limited in its scope to hardcore sexual conduct. Miller requires that the hardcore sexual conduct be defined by the law with specificity. And Miller demands that the reach of a state law banning sexually explicit materials be limited to those works which appeal to the prurient interest, are patently offensive and lack serious literary, artistic, political or scientific value.

It was against these standards that this court measured the definition of obscenity in force in Ohio in its initial decision in this case. Sovereign News

Company v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977). This court concluded then that, as enacted by the legislature, Revised Code §§2907.01 and 2907.32, were substantially overbroad in four separate respects and were impermissibly vague, in violation of the First and Fourteenth Amendments. But prior to taking the serious step of declaring these statutes unconstitutional, this court thoroughly re-examined them to determine their susceptibility to an authoritative construction by the state courts that would repair their constitutional defects. It was only after this court determined that no reasonable judicial interpretation of Revised Code §§2907.01 and 2907.32 could cure their constitutional infirmities that this court declared them unconstitutional.

On December 7, 1978, a little over a year after this court's initial decision

in this case, the Supreme Court of Ohio handed down its decision in State v. Burgun, 56 Ohio St.2d 354 (1978), reh. denied, Jan. 17, 1979. In that case, the Ohio Supreme Court decided four consolidated appeals involving convictions under the same obscenity statute which this court had found to be unconstitutional. The Ohio Supreme Court rejected arguments made by the appellants in those cases that Revised Code §§2907.01 and 2907.32 are unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness. That court determined that the constitutional attacks on Ohio's definition of obscenity could be brushed aside by construing the statutory definition in such a manner as to incorporate in it the three-pronged test for obscenity set forth in Miller. That was done not by interpreting the statutory language, but by merely adding the Miller test to the statutory definition. In

other words, the Ohio Supreme Court left completely intact the definition of obscenity prescribed by Revised Code §2907.01 and simply appended the tripartite Miller formula.

The issue squarely confronting the court in this case in its present posture, then, is whether Revised Code §§2907.01 and 2907.32, as construed by the Supreme Court of Ohio, can be reconciled with the First and Fourteenth Amendments, as interpreted by the Supreme Court of the United States. In discussing this issue in the pages of this opinion that follow, this court will first review again what it believes the constitutional deficiencies of Ohio Revised Code §§2907.01 and 2907.32 as written to be. It will then demonstrate that the Supreme Court of Ohio did not cure the constitutional infirmities of these statutes by its decision in State v. Burgun, supra.

Stated simply, although the Ohio Supreme Court attempted to perform the "radical surgery"[1] which this court held would be necessary to save the Ohio obscenity statutes, it did not succeed.

A. As Written, Ohio Revised Code §§2907.01 and 2907.32 Are Unconstitutionally Overbroad

The Ohio definition of obscenity is set forth in Ohio Revised Code §2907.01, which provides, in pertinent part:

> As used in sections 2907.01 to 2907.37 of the Revised Code:
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
> (C) "Sexual activity" means sexual conduct or sexual contact, or both.
> . . .

1 Sovereign News, supra, at 448 F.Supp. 405.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative

effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

In its initial decision in this case, this court found the definition of

obscenity set forth above to be unconstitutionally overbroad. This court's holding is synthesized in the following excerpt from its opinion:

> "The court finds that in four separate instances §2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression."
>
> "First: Section 2907.01(F)(1)(2)(3)(4) and (5) fail to incorporate the three-part Miller test. The Miller test is a conjunctive three part test, all parts of which must be satisfied before the material may be found obscene...However, under Ohio Revised Code §2907.01 material may be found obscene without the state being required to prove each of the three parts of Miller. An example of this is 2907.01(F)(1) which defines as 'obscene,' material whose '...dominant appeal is to prurient interest.' Under Subsection (F).1), the Miller requirements that (b) the material be 'patently offensive' and (c) that 'taken as a whole, it lacks serious literary, artistic, political or scientific value,' need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious

literary value, may, under Ohio Revised Code §2907.01(F)(1), be found to be obscene. The Court concludes that Ohio R.C. §2907.01 restricts material which is not 'obscene,' making the statute overbroad."

"Second: Section 2907.01 (F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the state is therefore overbroad.

"Third: Section 2907.01 (F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene...Therefore the court finds §2907.01(F)

(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

"Fourth: Section 2907.01 (F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose 'dominant appeal is to prurient interest' is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction." Sovereign News Company v. Falke, supra, at 448 F.Supp. 400 (footnotes omitted).

The overbreadth of Ohio's definition of obscenity, as written, is as substantial as it is obvious. In the teeth of express holdings of the Supreme Court in such cases as Miller and Jenkins v. Georgia, 418 U.S. 161 (1974), that only patently offensive depictions of hardcore sexual conduct may be criminally punished, the Ohio obscenity law proscribes depictions of violence, cruelty, brutal-

ity, semi-nudity and even the touching of a thigh of another. Despite the Supreme Court's insistence that a state law include all three prongs of the test for obscenity announced in Miller, the Ohio statute is written in the disjunctive and permits a finding of obscenity even when one or two prongs of the Miller test are not satisfied. Revised Code §§2907.01 and 2907.32, as written, are substantially and unconstitutionally overbroad.

B. As Written, Revised Code §§2907.01 and 2907.32 Are Unconstitutionally Vague.

In its initial decision in this case, this court held that Ohio's definition of obscenity is unconstitutionally vague, because it fails to specify the kinds of sexual depictions which are proscribed. For example, Revised Code §2907.01(F), which is written in the disjunctive, provides

in subsection (1) that material is obscene if "[i]ts dominant appeal is to prurient interest." That subsection is impermissibly vague because it altogether neglects to specify sexual conduct, the depiction of which may be found obscene. As this court stated once before:

> "The Supreme Court has stated, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). See, e.g., Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed. 2d 185 (1975); Smith v. Goguen, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Further, statutes which impinge on the area of freedom of expression must have a '...greater degree of specificity than in other contexts,' Goeguen, supra, 415 U.S. at 573, 94 S.Ct. at 1247, so as to insure that citizens will not be 'chilled' from exercising their constitutional right to free expression. See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d

659 (1976); Stromberg v. California, 283 U.S. 359, 369-370, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); Edwards v. South Carolina, 372 U.S. 229, 238, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

"Because of the need for greater clarity when a statute restricts conduct closely associated with expression, the Supreme Court has established special standards for determining vagueness. In Miller v. California, the Supreme Court required that statutes restricting 'obscene' material 'specifically define' the forms of sexual conduct restricted. Miller v. California, supra, 413 U.S. at 27, 93 S.Ct. 2607. Applying this standard to Ohio Revised Code §2907.01(F) the court finds that the statute fails to specify the types of sexual conduct that are banned.

"The court therefore declares Ohio Revised Code §2907.01(F) unconstitutionally vague." Id., at 448 F.Supp. 405-406 (footnotes omitted).

C. As Construed by the Ohio Supreme Court, Revised Code §§2907.01 and 2907.32 Remain Unconstitutionally Overbroad.

In its decision in State v. Burgun, 56 Ohio St. 2d 354 (1978), reh. denied (Jan. 17, 1979), the Supreme Court of

Ohio was presented with a challenge to the constitutionality of Revised Code §§2907.01 and 2907.32. Specifically, the appellants in that case urged that those statutes are unconstitutionally overbroad and vague. The Ohio Supreme Court rejected those claims, however, and sustained the constitutionality of Revised Cose §§2907.01 and 2907.32.

That court conceded that Ohio's definition of obscenity, written in the disjunctive, does not on its face satisfy the Supreme Court's pronouncement in Miller v. California, supra, that a state law must define obscenity as only those materials which, taken as a whole, appeal to the prurient interest in sex; which portray specifically defined hard-core sexual conduct in a patently offensive way; and which, taken as a whole, lack serious, literary, artistic,

political or scientific value. But the Ohio Supreme Court paid particular attention to the statement in Miller that an otherwise unconstitutional obscenity law would be upheld by the United States Supreme Court if it were given an authoritative gloss by the state's judiciary which narrowed the statute to constitutionally permissible parameters. And without any hesitation or question whatsoever, the Ohio Supreme Court determined that it would try to save Ohio's obscenity law from federal constitutional attack by judicial construction.

Somewhat surprisingly, the Ohio Supreme Court made this determination without any discussion of the wisdom or propriety, from the perspective of state law and policy, of attempting to rewrite a legislative enactment. It did not consider whether the kind of judicial

gloss it was to place on the statute would constitute an infringement on the power of the legislature.[2] It failed to reflect upon whether or not interpreting a criminal statute in a way which is inconsistent with the statute's plain words can be reconciled with the legislature's intent in enacting the statute.[3]

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[2] In other contexts, the Ohio Supreme Court has demonstrated its acquaintance with this rule of judicial restraint. See State v. Young, 62 Ohio St. 2d 370, 374 (1980),"...a court, in interpreting a legislative enactment, may not simply rewrite it...."

[3] Numerous other state courts who have compared their state obscenity laws with Miller have found them wanting, have struck down the laws rather than attempt to rewrite them. ABC Interstate Theatres, Inc. v. State, 325 So.2d 123 (Miss. 1976)("We determined that the enactment of criminal offenses was best left to the legislature." Id., at 126). Commonwealth v. Horton, 365 Mass. 164, 310 N.E.2d 316 (1974) ("[W]e decline to undertake the task of trying to list the specific sexual conduct whose display or description §284 proscribes. To do so would constitute a judicial rewriting of that statute."310 N.E.2d at 321-322); Art Theater Guild Inc. v. Rhoades, 510 S.W. 2d 358 (Tenn.

Neither did the Ohio Supreme Court pause to consider this court's conclusion in its first opinion in this case that no reasonable judicial interpertation could repair the several defects in the

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3 cont.

1974)("The function of this Court is to interpret a statute... and we will not and cannot usurp the prerogatives of the legislature by supplying essential elements to a statute which have been omitted by that body." Id., at 261); State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973) ("No court under the guise of construction may extend, enlarge, or otherwise change the terms and meaning of a statute." Id., at 656). State v. Princess Cinema of Milwaukee, 292 N.W.2d 807 (Wisc. Supreme Court 1980)("The job of drafting of penal legislation is primarily one for the legislature. This court is once again being asked to judicially amend the obscenity statute to bring it into compliance with the presently perceived standards emanating from the United States Supreme Court.... We conclude, at this time, that this is a determination for the legislature." Id., at 292 N.W.2d 813-814); State v. New Horizons, Inc., No. 79SA322, (Colorado Supreme Court, Aug. 18, 1980) ("While we recognize a duty, whenever possible, to authoritatively construe a Colorado statute to conform to constitutional standards, we are bound by the clear language of the statute and must declare it unconstitutional." Id., at Slip Op. 12).

statute.[4] Rather, the Ohio Supreme Court immediately turned to its judicial business: the attempt to save Ohio's indefensive obscenity law from federal

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"Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it. See Attwood v. Purcell, 402 F.Supp. 231, 234 (D. Ariz. 1975). For example, the statute defines the depiction of violence as 'obscene.' See Ohio Revised Code §2907.01 (F)(3). No reasonable judicial interpretation of this section can save it from unconstitutionally impinging on free expression. Another example is that the depiction of simple nudity is defined as obscene. See Ohio Revised Code §2907.01(F)(5) and (H). No gloss that would sufficiently narrow this section is reasonably available. Finally, each section of Ohio Revised Code §2907.01(F) lacks one or two parts of the three part Miller test. To restructure Ohio Revised Code §2907.01(F) into a conjunctive statute in order to satisfy the Miller test, when it is a disjunctive statute on its face, would require strained reasoning by an Ohio court. This court cannot presume Ohio courts will not interpret §2907.01 reasonably. The court concludes that §2907.01 is not readily subject to narrowing by state court interpretation. See, e.g., Allied Artists Pictures Corp. v. Alford, 410 F.Supp. 1348, 1356-1357 (W.D. Tenn. 1976); Attwood v. Purcell, 402 F.Supp. 231, 235 (D. Ariz. 1975); Stroud v. Indiana, Ind., 300 N.E.2d 100 (1973)." Sovereign News, supra, at 448 F.Supp. 405.

constitutional attack. That court concluded that such a result could be accomplished without modifying the statutory langauge itself but by merely adding to it the three-pronged Miller formula. In other words, the language of Revised Code §2907.01 was left completely intact, but added to the statutory language at the end was the Miller formula. The Ohio Supreme Court held as follows:

> "We hold that R.C. 2907.01 (F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an 'authoritative' state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted

parameters, the appellants' proposition of law has no merit.

> "In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a 'narrowing' instruction restricting the definition of obscenity to the test laid down in Miller. In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in State v. Burgun, case No. 77-1144, where the failure to instruct on Miller was reversible error." State v. Burgun, supra, at 56 Ohio St. 2d 361-362.

This holding was reaffirmed by the Ohio Supreme Court in State v. Thomas, 57 Ohio St.2d 71 (1979).

This court, of course, is bound by the interpretation given by the Ohio Supreme Court to its own state law. Brown v. Ohio, 431 U.S. 161, 167 (1977); Aero Mayflower Transit Co. v. Board of R. Comrs., 332 U.S. 495, 499-500 (1947);

Kingsly Pictures Corp. v. Regents, 360 U.S. 684 (1959). Accordingly, in view of the judicial gloss placed upon Revised Code §2907.01 by the Ohio Supreme Court, the statute which this court must measure against federal constitutional commands is composed of the language of section 2907.01 followed by the language of the Miller formula. The result can be seen most vividly by examining the jury instructions on the question of obscenity given by the trial court in one of the three cases affirmed in Burgun, for the Ohio Supreme Court expressly held that those instructions constituted a correct statement of the definition of obscenity under Revised Code §2907.01, as interpreted by the Ohio Supreme Court.

> "'Obscene,' is defined as follows: When considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible

group, judged with reference to such group, any material or performance is obscene if any of the following apply:

(1) Its dominant appeal is to prurient interest.

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite.

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality.

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, moral, or artistic purpose.

And the last:

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre

violence, cruelty, brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

. . .

"The Court: In addition to the statute which I have read to you, which defines the term 'obscene,' the following additional factors must be taken into your consideration:

> According to the United States Supreme Court, the basic guidelines for the trier of facts must be:
>
> '(A) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
>
> '(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

'(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.'" (Trial transcript, pp. 529-532 in State v. Krute, one of the cases consolidated and decided in State v. Burgun, supra.[5]

This court concludes that Revised Code §2907.01, as construed by the Ohio Supreme Court in Burgun, remains unconstitutionally overbroad. Indeed, the constitutional infirmities of that statute have been intensified, rather than relieved, by the Burgun decision.[6]

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5 Attached as an appendix to this opinion are the critical jury instructions given in the three cases affirmed in State v. Burgun, supra. The Ohio Supreme Court held, in Burgun, supra, that these instructions constituted correct recitals of the definition of obscenity under R.C. 2907.01

6 The decision in Burgun is reminiscent of the unsuccessful attempt by the Ohio Supreme Court to save Ohio's death penalty from constitutional attack by attempting to place a judicial interpretation on the death penalty statute which would reconcile it with the latest decisions of the United States Supreme Court on that subject. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2966-67, (1978).

This court takes no issue with the well-established principle that an otherwise constitutionally deficient statute may be saved by an authoritative construction of the state's highest court. Ward v. Illinois, 431 U.S. 767 (1977). But in order to save such an infirm legislative enactment from successful constitutional attack, the juducial gloss must actually cure the statutory defect. A mere conclusory determination that the statutory language meets constitutional muster will not suffice. Nor will a construction which reaches only a portion of the statutory defect be sufficient to withstand constitutional attack.

In the judgment of this court, the attempt of the Ohio Supreme Court in Burgun to provide an authoritative construction broad enough to overcome the constitutional deficiency of the

statute, has failed. It failed because what remains of the statute after such "authoritative construction" does not meet federal constitutional standards. It failed because its announcement that it was in the process of authoritatively construing the statute, was not borne out by its operative performance in its opinion. It failed because its attempted construction of a statute designed to identify an already exquisitely vague offense so muddied the legal standard by which guilt was to be ascertained as to make nonsense out of a criminal law which is bound to give clear notice of its content to every citizen.

The several material respects in which the Burgun decision has failed to shore up the sagging statute will be considered below.

1. The Ohio Supreme Court Did Not Narrow the Statutory Language Pertaining to the Kinds of Depictions Which May Be Found Obscene

In Burgun, the Ohio Supreme Court left the language of Revised Code §2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged Miller formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the langauge of Revised Code §2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code §2907.01 itself.

The second part of the Miller test of obscenity, which has been added to Revised Code §2907.01 by the Burgun decision, reads as follows:

> "(b) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the by the applicable state law; ...." Miller, supra, at 413 U.S. 24 (Emphasis added).

It is clear from this language that the Miller formula is not a self-sufficient definition of obscenity. On the contrary, Miller's second prong can be implemented only by legislation, or judicial interpretation of legislation, which specifically prescribed what types of sexual depictions or descriptions may be obscene. When, as is true of Revised Code §2907.01, the law as written lacks the requisite precision and censors expression which is constitutionally protected, Miller requires an authoritative construction

which affirmatively supplies the missing specificity and which limits the law's reach to a ban on designated hardcore pornography.

In the Burgun decision, however, the Supreme Court of Ohio declined to list what kinds of sexual depictions may be found obscene under Revised Code §2907.01. Instead, the court found that the statutory language alone and without judicial interpretation is narrow and specific enough to comply with Miller's second prong. The court expressly stated that Revised Code §2907.01 is"...extremely precise in defining what conduct is prohibited." Burgun, supra at 56 Ohio St. 361. Accordingly, in adding the Miller formula to Revised Code §2907.01, the Supreme Court of Ohio did not alter in any fashion the law's recital of the kinds of descriptions or depictions which may be found obscene in Ohio.

It is this feature of the Ohio Supreme Court's decision in Burgun which readily distinguishes this case from Ward v. Illinois, 431 U.S. 767 (1977). In that case, the petitioner attacked as unconstitutionally vague and overbroad the obscenity law of the state of Illinois. Illinois law defines obscenity, in relevant part, as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters...."

Although this statute, as written, clearly could not have survived Miller, the Supreme Court of the United States upheld its constitutionality because it had been given a saving judicial construction by the Illinois Supreme Court.

In numerous prior decisions, the Illinois Supreme Court had described in vivid detail the kinds of hardcore sexual conduct portrayed in materials validly found obscene under Illinois law. These decisions, the court held, afforded petitioner Ward adequate notice that his conduct was clearly within the statute's prohibition, thereby rendering his vagueness challenge to the statute without merit.

The petitioner's overbreadth argument was based upon his contention that the statute was not limited in its reach to only a ban on specifically defined hardcore pornography, as required by Miller v. California, supra. This argument too was rejected on the basis of the gloss that had been placed on the statute by the Illinois Supreme Court which narrowed the statute's scope to the kinds of sexual

depictions which the court in Miller listed as examples of what a state obscenity law could validly regulate.

In particular, the court pointed to one case in which the Illinois Supreme Court had adopted the first two prongs of the Miller guidelines as part of Illinois' obscenity law. In the same decision, the Illinois Supreme Court had construed its state law to include, in place of Miller's third prong, the more onerous "utterly without redeeming social value" standard of Memoirs v. Massachusetts, 383 U.S. 413 (1966).

Significantly, however, the court noted that the Illinois obscenity statute could not survive an overbreadth challenge merely because the first two prongs of the Miller test along with the Memoirs social value test had been incorporated into the statute. This is because the second prong of the Miller test expressly

commands that the state law, as written or as construed, specifically define the kinds of sexual conduct the representation or depiction of which may be obscene. Thus, if the Illinois Supreme Court had merely adopted part (b) of the Miller guidelines and "...did not go further and expressly describe the kinds of sexual conduct intended to be referred to under part (b) of the Miller guidelines...", Ward, supra, at 431 U.S. 775, the statute would have remained unconstitutionally overbroad.

The court concluded, however, that the Illinois Supreme Court had, in fact, added the requisite specificity to its statute by adopting not just part (b) of the Miller test but also the follwoing language from Miller in which the court gave examples of what a state could validly regulate under part (b) of the Miller test:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> '(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> '(b) Patently offensive representations or descriptions of masturbation, execretory functions, and lewd exhibition of the genitals." Miller, supra, 413 U.S. at 25 (footnotes omitted).

Because the Illinois Supreme Court had construed the state's obscenity law to incorporate Miller's second prong and Miller's explanatory examples, the court concluded that the statute was not subject to attack for overbreadth.

Several factors led the court to conclude that Illinois' highest court had

incorporated into the state's obscenity law not just part (b) of the Miller guidelines but Miller's explanatory examples as well. First, Illinois' obscenity law, as written, is completely open-ended. The Illinois Supreme Court must have been aware of Miller's specificity requirement and the fact that its state statute did not, as written, even arguably satisfy that requirement. Thus, the court must have intended to incorporate into that statute which readily lent itself to an appropriate narrowing interpretation, Miller's explanatory examples in order to supply the precision which the statute obviously lacked.

Second, in a later decision, the Illinois Supreme Court quoted at length from Miller, including the passage from Miller containing the explanatory examples given in that case. It then noted that

it had incorporated parts (a) and (b) of the Miller guidelines into the state's obscenity law in an earlier case and in so noting that fact referred directly to the Miller passage it had quoted. Because the quoted passage from Miller included Miller's explanatory examples, the court concluded that the Illinois Supreme Court had intended to adopt the Miller examples as well as the guidelines themselves.

Finally, the Illinois Supreme Court's application of the state's obscenity statute to particular cases reviewed by the court demonstrated its respect for the limitations imposed by the First Amendment upon the power of the states to proscribe expressive materials. In those cases in which the Illinois Supreme Court concluded that particular works could validly be found obscene under the state's law, the court's detailed de-

scription of the contents of those works left no doubt that those works vividly depicted, in a patently offensive way, numerous acts of sexual intercourse, masturbation, cunnilingus, fellatio, lesbian intercourse and other hardcore sexual conduct. Thus, the decisions of the Illinois Supreme Court applying the state's obscenity law to particular cases demonstrated that court's intention to narrow the reach of the state law to the kind of sexual depictions given as examples in Miller.

For these reasons, the court concluded that Illinois' highest court had incorporated both the Miller guidelines and the explanatory examples of Miller into the state's obscenity law. As so construed and narrowed, Illinois' obscenity law was not overbroad.

Precisely the opposite is true of Ohio's obscenity law as interpreted by

its highest tribunal. The evidence is clear and unmistakable that in Burgun the Ohio Supreme Court did not intend to incorporate Miller's explanatory examples into Revised Code §2907.01 or to narrow that law's reach to a prohibition on the depiction or description of the kinds of sexual conduct identified in Miller's explanatory examples.

First, unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed findings of obscenity in cases clearly not involving the kind of sexual depictions given as examples in Miller. State ex re. Keating v. Vixen, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973), is a particularly apt example, because that case is cited with approval by the Ohio Supreme Court in Burgun. The decision in Vixen was the second one that had been rendered by the Ohio Supreme Court in that case.

The first time that court considered the case, it found that the film "Vixen" was obscene under Revised Code §2905.34, the predecessor to Revised Code §2907.01, and affirmed an injunction against the film's exhibition. State ex rel. Keating v. Vixen, 27 Ohio St. 2d 278 (1971). That decision was appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of Miller and its companion cases. A Motion Picture Film Entitled "Vixen" v. Ohio, 413 U.S. 905 (1973).

On remand, the Ohio Supreme Court found that definition of obscenity then in force in Ohio comported, on its face, with Miller and that the film "Vixen" was, indeed, obscene. State ex rel. Keating v. "Vixen", 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

The film found by the Ohio Supreme Court to be obscene, even after Miller

was decided and considered, was described by the Ohio Supreme Court in its earlier opinion as follows:

> The principal character, Vixen, is a buxom young wife, whose "square" husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism, and airplane hijacking.

> It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.

(Emphasis added; 272 N.E.2d at 139).

The court further noted, at 272 N.E.2d 140:

> Assume, hypothetically that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an "eye on the recent Supreme Court rulings?" The questions supplies its own answer.
>
> Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.

(Footnotes omitted).

As described by the Ohio Supreme Court, the film "Vixen" clearly is not the kind of hardcore pornography which Miller permits the states to censor. Indeed, based

on the description given by the Ohio Supreme Court, "Vixen" is less explicit than the film found to be protected by the First Amendment in Jenkins v. Georgia, 418 U.S. 161 (1974).

Similarly, the Ohio Supreme Court's suggestion that "The Sound of Music" could be rendered obscene by the inclusion of a single act of sexual lewdness in one scene completely ignores what has been basic constitutional law since the 1957 decision of the Supreme Court in Roth v. United States, 354 U.S. 476 (1957) - that, in judging whether a work is obscene, it must be considered as a whole and in its entirety.

Thus, unlike the decisions rendered by the Illinois Supreme Court summarized in Ward, the decisions of the Ohio Supreme Court have not applied the state's obscenity statute only to works which depict the kinds of hardcore sexual con-

duct given as examples in Miller. For this reason, initially, this court concludes that in Burgun, which cited the Vixen decision with approval, the Ohio Supreme Court did not intend to adopt the Miller examples or to narrow the Ohio obscenity statute to the kinds of sexual depictions set forth in those examples.

Second, unlike Illinois' obscenity law, Ohio's law does not lend itself to an interpretation which incorporates Miller's explanatory examples. While subsection (F)(1) of Revised Code §2907.01, which defines as obscene any material whose "dominant appeal is to prurient interest," is open-ended, subsections (F)(2), (3), (4) and (5) are not. Those latter subsections define obscenity in detailed terms which substantially exceed and cannot be reconciled with the Miller examples. Revised Code §2907.01, unlike Illinois' open-ended law, simply is not

susceptible to an interpretation incorporating in it the Miller examples. This fact, along with the Ohio Supreme Court's statement in Burgun that it believes Revised Code §2907.01 to be "...extremely precise in defining what conduct is prohibited," Id. at 56 Ohio St.2d 361, leads to the inevitable conclusion that the court in Burgun did not adopt the Miller examples.

Third, the Ohio Supreme Court, in Burgun, quoted a passage from Miller which contained the three-pronged Miller test but which excluded the portion of the Miller decision which set forth examples of what a state could validly regulate under the second prong of the Miller test. By way of contrast, one of the Illinois Supreme Court decisions upon which the court in Ward relied to uphold Illinois' statute quoted the passage from

Miller which included the explanatory examples. The court, in Ward, found this fact to be very significant and concluded from it that the Illinois Supreme court had incorporated Miller's explanatory examples into the state's obscenity law.

Fourth, the jury instructions given in the three cases in which convictions were affirmed by the Ohio Supreme Court in Burgun are most revealing. The affirmance of those convictions was expressly based upon the fact that the jury instructions were given by the trial court in those cases conformed to the interpretation given to Revised Code §2907.01 by the Ohio Supreme Court in Burgun. The Ohio Supreme Court specifically held that those instructions represented correct recitals of the definition of obscenity under Ohio law, as construed in Burgun. In each of those three cases, the trial court read Revised Code §2907.01(F) to

the jury. It then read to the jury the three-pronged Miller test without any reference to Miller's explanatory examples. Thus, in each of those three cases the trial court's instruction to the jury on the second prong of the Miller formula was substantially as follows:

> "...Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." (From p. 532 of the trial transcript in State v. Krute, one of the cases affirmed in Burgun, supra.)

Given the fact that the Ohio Supreme Court affirmed the convictions in those three cases on the express ground that the jury instructions given by the trial courts correctly stated the definition of obscenity under Revised Code §2907.01, as construed in Burgun, the conclusion is inescapable that the Ohio Supreme Court did not incorporate into Ohio's obscenity law Miller's explanatory examples.

As a result, in order to withstand constitutional attack, Revised Code §2907.01 must meet, on its face, the requirement, under the second prong of the Miller formula, that a state obscenity law must be limited to a ban on the representation or description of specifically defined hardcore sexual conduct. As will be seen, however, Revised Code §2907.01 does not satisfy the constitutional requirement.

2. Under Revised Code §2907.01, As Construed by the Ohio Supreme Court, Non-Hardcore Sexual Depictions May Still Be Found Obscene.

Even after Burgun, subsections (F)(1), (2), (3) and (5) of Revised Code §2907.01, which remain in effect, still prohibit descriptions and depictions of non-hardcore sexual conduct. For example, simple nudity may still be found obscene under Revised Code §2907.101. And subsection

(H) of Revised Code §2907.01 defines "nudity" so broadly that it includes a depiction of a woman wearing an evening dress which exposes any portion of her breast "below the top of the nipple" and the showing of a male or female buttocks with "less than a full, opaque covering." Similarly, a depiction of "sexual activity" includes "sexual contact," which in turn includes a depiction or description of the mere touching by one person of the thigh of another person during a love scene. See Revised Code §2907.01(B) and (c). The decisions of the Supreme Court in Miller v. California, supra, and Jenkins v. Georgia, 418 U.S. 153, 162 (1974), make it clear that a state is constitutionally prohibited from defining obscenity so broadly. Because, under Burgun, in contrast to the decisions of the Illinois Supreme Court noted in Ward, depictions of nudity, semi-nudity,

touching by one person of the thigh of another and other non-hardcore sexual depictions may still be found obscene under Ohio's law, Revised Code §2907.01 remains substantially and unconstitutionally overbroad.

Indeed, a recent decision by the Court of Appeals of the First Appellate District of Ohio reveals, in an ironic way, the failure of the Burgun decision to deal with the overbreadth of Revised Code §2907.01 and the confusion created by the Burgun decision for the lower courts which must deal with the always difficult issues raised in obscenity prosecutions. State v. Sovereign News Company, No. C77676 (Hamilton County, Ohio, Court of Appeals, September 3, 1980). In that decision, the court rejected a challenge to the constitutionality of Ohio's obscenity statute because it felt bound

by the Burgun decision. Yet it reversed a conviction under the statute because it found the search warrant used to obtain the charged materials to be over-broad, in violation of the Fourth Amendment, since the warrant contained the same statutory language and thereby impermissibly authorized seizure of materials protected by the First Amend-ment. The court stated as follows:

> "Preliminarily, it is fair to note that the instant search warrant presents at least one feature of specificity not found in [Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrants, 367 U.S. 717 (1961); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)]: here the materials to be seized were qualified as or limited to those depicting sexual activitiy,' a concept arguably more precise and specific than 'obscene.' Unfortunately, the term 'sexual activity' is a phrase of art in Ohio, bearing a specific meaning defined by statute. Thus, R.C. 2907.01 defines the phrase as follows:

"(C) 'Sexual activity' means sexual conduct or sexual contact, or both.

In turn, the same statute defines those two latter concepts in the following language:

"(A) 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"(B) 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

"While a serach warrant limited to material depicting 'sexual conduct,' as defined above, could arguably meet Fourth Amendment standards of specificity, it is difficult to conceive that depictions of 'sexual contact' would invariably or even usually constitute obscenity. Certainly it is possible to imagine depictions of a R.C. 2907.01(B) 'touching' which meet the Miller v. California, supra, criteria; but it is equally possible to imagine quite innocent, or at least non-pornographic, represen-

tations of such tactile encounters." (Slip Op. at 12-13; footnotes omitted.)

As a result of Burgun, the court had to reject the claim that Revised Code §2907.01 represents an unconstitutional restriction on expression which is constitutionally protected. Yet it struck down a search warrant on the ground that the very same statutory language could not be used in a search warrant without rendering the warrant overbroad on the ground that it authorizes seizure of constitutionally protected materials.

This decision by an intermediate state appellate court serves to illustrate how the Ohio Supreme Court in Burgun has aggravated, rather than solved, the constitutional problems which permeate Revised Code §2907.01.

3. Under Revised Code §2907.01, As Construed by the Ohio Supreme Court, Depictions of Violence, Cruelty and Brutality May Still Be Found Obscene.

In Burgun, the Ohio Supreme Court left intact the statutory language which prohibits depictions of extreme or bizarre violence, cruelty or brutality found in subsections (F)(3) and (5) of Revised Code §2907.01. That court did not construe, interpret or limit that language in any way. The statute remains constitutionally overbroad, therefore, because it restricts expression protected by the First Amendment. As this court stated in its first decision in this case:

> "...It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrain free expression, and the statute is therefore overbroad." Sovereign, supra at 448 F.Supp. 400 (Emphasis added).

4. Under Revised Code §2907.01, as Construed by the Ohio Supreme Court, Sexual Depictions Protected by the First Amendment May Still Be Found Obscene.

In Burgun, the Ohio Supreme Court determined that Revised Code §2907.01(F) is sufficiently precise in defining what depictions may be found obscene. That court, therefore, found it unnecessary to add any further specificity to the statute. Instead, it merely added at the end of the statute the Miller guidelines while leaving Revised Code §2907.01 (F) intact because, in its view, the statute itself is adequate to satisfy the command of Miller that a state law must be limited in its scope to materials which describe or depict "...sexual conduct specifically defined by the applicable state law." Miller, supra, at 413 U.S. 24.

At the same time, the Ohio Supreme Court recognized that Revised Code §2907.01

(F) is written in the disjunctive. In Burgun, the Ohio Supreme Court did nothing to change this basic statutory structure. Thus, even after Burgun, each one of the five subsections of Revised Code §2907.01 (F) defines independently what kinds of depictions are within the statute's reach. At most, then, the Burgun decision stands for the proposition that material may be found obscene in Ohio if it satisfied the first and third prongs of the Miller test and any one of the five definitions set forth in Revised Code §2907.01(F), each of which, the Ohio Supreme Court determined, is adequately precise to meet the specificity requirement set forth in part (b) of the Miller guidelines.

But subsection (1) of the Revised Code 2907.01(F) defines as obscene any material whose "dominant appeal is to prurient interest." That subsection

altogether fails to define the sexual conduct the depiction of which is within its inhibition. The subsection is, therefore, unconstitutionally vague. Its open-ended nature also renders it impermissibly overbroad because it may be applied to restrict sexual depictions protected by the First Amendment.

D. As Construed by the Ohio Supreme Court, Revised Code §2907.01 Remains Unconstitutionally Vague.

The Ohio Supreme Court specifically declined to specify the kinds of sexual conduct whose depiction may be found obscene under Revised Code §2907.01. Instead, that court concluded that the statute on its face is sufficiently precise to overcome a vagueness challenge. This court came to an opposite conclusion in its first opinion in this case. After careful reconsideration in the light of Burgun, this court remains convinced that

Revised Code §2907.01 is unconstitutionally vague. Certainly, the addition of the Miller test at the end of the statute, without the Miller examples, does not add the necessary specificity to save the statute. For example, subsection (1) of the Revised Code §2907.01(F) remains completely open-ended and nowhere specifies the sexual depictions proscribed by its terms. Revised Code §2907.01, therefore, remains unconstitutionally vague even after Burgun.

In fact, the Burgun decision has exacerbated, rather than alleviated, the vagueness of Revised Code §2907.01. By tagging onto the end of a five-part disjunctive statute, by judicial amendment, the three-pronged conjunctive test of Miller, the Ohio Supreme Court has created more, rather than less, confusion in this already exquisitely vague area.

The confusion is heightened by the fact that the Miller guidelines are altogether inconsistent with the statutory language to which those guidelines are now appended. Prosecutors, policemen and juries are now informed that the State of Ohio defines obscenity in one way but that the Supreme Court of the United States defines it in another way. It is left to them to decide, on an ad hoc basis, if and how these inconsistent sets of criteria can be harmonized. And potential violators of this new mixture of statutory and constitutional law have no way of knowing by which of two different tests the lawfulness of their conduct will be measured.

Revised Code §2907.01, as construed by the Ohio Supreme Court, is unconstitutional under the First and Fourteenth Amendments due to vagueness.

CONCLUSION

For all of these reasons, this court finds that the Ohio obscenity statutes remain, even after the Burgun decision, void for overbreadth and vagueness.

There are those who will complain that this federal court has not paid sufficient deference to the decision of a high state tribunal. Nothing could be further from the truth. Our scheme of federalism quite properly permits - in fact, requires - a state court to interpret its own legislation, and measure it against federal as well as state constitutional standards. It is altogether appropriate that state courts do so. Because this court feels so strongly that this legitimate state judicial function should be encouraged, it has spent many hours examining the Burgun opinion in an attempt to avoid the disparate result reached here.

But the federal court system has its own responsibility, quite apart from the state's obligation to perform its constitutional duty. The federal court is obliged to protect the federal rights of all within its reach. That obligation is intensified when the state courts have failed to do so.

This court does not believe that the federal court system need wither away so that the state legal system may survive. The dual legal systems are partners in the business of protecting the rights of their constituents. A proper approach to federalism lies in the recognition of the fact that a citizen is entitled to have his liberty protected by both the state in which he resides and the nation to which he pledges his allegience, and in the understanding that when one sovereignty fails to provide him justice,

he may look to the other for the relief which the Constitution guarantees him.

With this understanding of its responsibility, this court cannot rubberstamp the result reached by the Ohio Supreme Court in Burgun.

In the vague area of obscenity, the Burgun decision has further obfuscated an already unclear law, and has guaranteed that future prosecutions under it will be fundamentally suspect. Nor has that overbroad legislative enactment been brought, by judicial construction, within constitutionally acceptable limits. This court can neither ignore these salient consequences, nor its own constitutional duty. It therefore finds Ohio Revised Code §§2907.01 and 2907.32, as construed by State v. Burgun, to be void for overbreadth and vagueness.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 76 CR 627
Court of Appeals No. 36264
Supreme Court No. 77-1154

CITY OF CLEVELAND

vs.

THOMAS BAYLESS

JURY CHARGE
Excerpt from Transcript of Proceedings

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the mind of the defendant, an awareness or belief that he did participate in presenting an obscene performance where an admission price was charged.

"Performance" means any motion picture, preview, trailer, play, show, skit, dance or other exhibition performed before an audience.

"Obscene" means when considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such a group, any material or performance is "obscene" if the following apply:

(1) Its dominant appeal is to the prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement or nudity in a way which tends

to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodiy functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty or brutality or human bodily functions of elimination, the cumulative effect of which is dominant tendency to appeal to prurient or

scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

In addition to the statute which I have read to you which defines the term obscene, the following additional factors must be taken into your consideration.

According to the United States Supreme Court, the basic guidelines for the tryor of the fact -- and that is the jury -- must be:

(A) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and

(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three of these factors must be considered by you, and in order to find that the material involved in this matter is obscene, you must find that all three factors are present in this case.

"Sexual activity" means sexual conduct or sexual contact, or both.

"Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"Fellatio" means sexual activity committed with a male sexual organ with the mouth.

"Cunnilingus" means sexual activity committed with the mouth on the female

sexual organ.

"Sexual excitement" means the condition of human male or femal genitals when in a state of sexual stimulation or arousal.

"Nudity" means the showing, representation or depiction of human male or femal genitals, pubic area or buttocks with less than a full, opaque covering or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

Now, you must not discuss or consider the subject of punishment. Your duty is confined to the determination of the guilt

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 75 CRB 17311
Court of Appeals No. 36368
Supreme Court No. 77-1155

STATE OF OHIO

vs.

FRANK TUROSO

JURY CHARGE
Excerpt from Transcript of Proceedings

The second is the word or term obscene.

The third is the work participant or participation, and the fourth is admission.

I am now going to define for you each of these four terms.

When I say admission to you it is meant to mean admission charge. We will get to that later.

The first item I am going to define for you as a matter of law which you are obliged to follow is, knowledge, knowledge of the character and content. What does the word knowledge mean? This is what it means: A person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of the circumstances when he is aware that such circumstances probably exist.

The next item that I am going to define for you is the word or term "obscene." This is what the word or term in this case means: When considered as a whole and judged with reference to ordinary adults, or if it is designed for sexual gratification or other specially susceptible groups judged with reference to such group any material or performance is obscene if any of the following apply. Now, there is five of them.

Number one, "its dominant appeal is to prurient interests;"

Number two, "its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;"

Number three, "its dominant tendency is to arouse lust by displaying or

depicting bestiality or extreme or bizarre violence, cruelty, or brutality;"

Number four, "its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;"

Fifth and last, "it contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interests, when the appeal to such an interest is primarily for its

own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose."

That, ladies and gentlemen of the jury, is the definition of the term obscene which you are obliged to follow.

Now, I have defined for you knowledge. I have defined for you obscene. There are two more of the four essential elements.

MR. YASINOW: Your Honor.

THE COURT: Yes.

(Discussion had off the record.)

THE COURT: In a moment I am going to define for you the word participation and the word admission pertaining to admission charge, but I am now going to clarify for you further the term obscene. I want you to know the following: In addition to the statute I have read to you which defines the term obscene, the

following additional factor must be taken into your consideration. According to the United States Supreme Court, the basic guidelines for the trier of the fact must be "whether the average person applying contemporary community standards would find that the work taken as a whole appears to the prurient interest, whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable statute law, whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

The area from which the contemporary community standards is to be judged is that of the limits of the City of Cleveland.

What does the work "participant" mean, or "participation"? It is simply the understanding that an ordinary reasonable

person would have of the word participant or participation.

What does the word "admission" as it might apply to admission charge, mean? Again, it is the same thing. It is the understanding which an ordinary reasonable person would have of the term admission or admission charge.

You may not find the defendant guilty unless you find beyond a reasonable doubt that on or about July 3rd, 1975 Mr. Frank Turoso had knowledge of the content and character of the particular film which you have seen presented here in Court.

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 75 CRB 14419
Court of Appeals No. 36092
Supreme Court No. 77-1279

STATE OF OHIO

vs.

WILLIAM KRUTE

JURY CHARGE
Excerpt from Transcript of Proceedings

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is charged."

The essential elements of this crime, each of which the State, the prosecution, must prove beyond a reasonable doubt, are as follows: Knowledge. It is defined as follows: A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

The next element that must be proved by the State beyond a reasonable doubt is the word "obscene."

"Obscene," is defined as follows: When considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged

with reference to such group, any material or performance is obscene if any of the following apply:

(1) Its dominant appeal is to prurient interest.

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite.

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality.

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educa-

tional, sociological, moral, or artistic purpose.

And the last:

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

The authorized elements of this crime which the State of Ohio--

MR. YASINOW: Your Honor, may I?

The COURT: Yes.

(Thereupon, discussion was had between Court and counsel, out of the hearing of the jury, and off the record:)

THE COURT: In addition to the statute which I have read to you, which defines the term "obscene," the following additional factors must be taken into your consideration:

According to the United States Supreme Court, the basic guidelines for the trier of facts must be:

"(A) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.

"(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law," and:

"(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

The area from which the contemporary community standard is to be judged is that of the limits of the City of Cleveland.

There are two other terms or elements

ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-442
	)	
Petitioner,	)	JUDGE JOHN M. MANOS
	)	
-vs-	)	
	)	
CLEVELAND MUNICIPAL COURT, et al.,	)	FINAL JUDGMENT ORDER [Entered Oct. 6, 1980]
	)	
Respondents	)	

Pursuant to the memorandum attached to this Order, the petition for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

OPINION OF OHIO COURT OF APPEALS

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 36859

APPEAL FROM

STATE OF OHIO,
CITY OF CLEVELAND

APPELLEE

CLEVELAND MUNICIPAL COURT

No. 75 CRB 25215

-vs-

FRANK TUROSO

APPELLANT

JOURNAL ENTRY

and

OPINION

DATE Feb. 8, 1979
PARRINO, P.J.:

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed

and upon review the following disposition made:

Appellant Frank Turoso was convicted of pandering obscenity, R.C. 2907.32(A)(2).[1] His trial before a jury commenced on July 12, 1976 in the Cleveland Municipal Court. The court sentenced appellant to 90 days in jail and fined appellant $1,000.00. The imposition of the sentence and fine was suspended pending this appeal.

Appellant appeals to this court assigning four errors for review.

"I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL TESTIMONY BECAUSE THE STATE FAILED TO OFFER SUFFICIENT EVIDENCE TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME."

The record indicates that on September

1/ R.C. 2907.32(A)(2) provides:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

"(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;"

25, 1975, appellant sold an allegedly obscene newspaper, entitled "Smut,"[2/] to Sergeant John Schmidt of the Cleveland Police Department. The place of the sale was the All Adult Bookstore, 3141 West 25th Street, Cleveland, Ohio.

A complaint charging appellant with pandering obscenity was filed on September 26, 1975.

At trial, the sole prosecution witness was Officer James Kennelly. Although Officer Kennelly did not personally purchase the newspaper, he observed Sergeant Schmidt purchase the newspaper from appellant.

Officer Kennelly testified that a sign in a window advertised the store as the "All Adult Bookstore." Another sign which hung over the street advertised

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2/ The cover of the newspaper designated it as Vol. 3 No. 44.

"Adult Movies 25¢ per play rated triple X." (Tr. 34). As he entered the store's door, Officer Kennelly saw another sign which advertised "Movies, Magazines, Marital aids, Novelties, et cetera." (Tr. 34-35).

On September 25, 1975, appellant was behind the store's counter. In the store's northeast corner, Officer Kennelly observed magazines which dealt with homosexuality. (Tr. 36). He also observed other sexually oriented magazines on display. (Tr. 51). "Bondage paraphernalia," including ankle bracelets, wristlets, and "various types of whips," were on display on one wall. (Tr. 52-53). The store also contained "peep type" movies, and "marital aids" in a showcase. (Tr. 53, 55).

Officer Kennelly observed Sergeant Schmidt "look over" the contents of the

newspaper before he purchased it. (Tr. 57, 58). Sergeant Schmidt brought the newspaper to appellant who was standing behind the counter. (Tr. 58). The newspaper was "open all the way" when it was placed on the counter. (Tr. 59). Appellant looked at the newspaper to see how much it cost. (Tr. 59, 62). The price of the newspaper is printed on the front page. Appellant rang up the sale and gave Sergeant Schmidt his change. Appellant picked up the newspaper, folded it, and placed it and a receipt in a brown paper bag. (Tr. 60). The transaction took 30-45 seconds. (Tr. 60).

Officer Kennelly testified that appellant "looked at it [the newspaper] when it was placed on the counter there." (Tr. 62).

The front page of "Smut" contains a picture of a bare-breasted woman. The

newspaper is subtitled "The World's Dirtiest Paper." The following warning is found on the bottom of the cover:

> "WARNING: Sexual material of an adult nature. This literature is not intended for minors and under no circumstances are they to view it, possess it, or place orders for the merchandise offered herein."

In appellant's first assignment of error, he claims that the court erred in overruling his motion for judgment of acquittal because there was insufficient evidence to prove that appellant sold the newspaper with knowledge of both its "character" and "contents." Appellant claims that knowledge of both the character and contents of printed material is a constitutionally required element of the offense of pandering obscenity. Appellant notes that R.C. 2907.32 requires that the state prove only that an alleged panderer of obscenity have "knowledge of

the character of the material or performance involved."

Appellant's assignment of error is without merit.

The Supreme Court of Ohio in the case of State v. Burgun (1978), 56 Ohio St. 2d 354, stated that proof that the accused knew the specific contents of the material he sold need not be established by the state. In syllabus two, the court in Burgun, id., held:

> "Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction under R.C. 2907.32(A)(4)."

In Hamling v. United States (1974), 418 U.S. 87, at 120, the United States Supreme Court approved the jury charge of a district court wherein the court stated that the prosecution need only prove that

the accused "had knowledge of the character of the materials."

We hold that the evidence found in the record and outlined above demonstrates that appellant had knowledge of both the character and the content of "Smut." The overruling of appellant's motion for judgment of acquittal (Tr. 76) was not erroneous.

Assignment of error No. I is overruled.

"II. THE STATUTE PURSUANT TO WHICH THE APPELLANT WAS CHARGED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE."

In his second assignment of error, appellant invites this court to reconsider our recent decision in State v. Burgun (1976), 49 Ohio App. 2d 112. We decline to do so in light of State v. Burgun (1978), 56 Ohio St. 2d 354.

This court held in State v. Burgun (1976), 49 Ohio App. 2d 112, that the definition of obscenity, as found in

R.C. 2907.01(F), is not overbroad or vague if properly explained and defined by the trial court in its charge to the jury. 49 Ohio App. 2d at 123. Accord, State v. Burgun (1978), 56 Ohio St. 2d 354.

In the present case, the trial court instructed the jury on both the statutory definition of obscenity found in R.C. 2901.01(F) and the "basic guidelines" for the trier of facts enunciated in Miller v. California (1973), 413 U.S. 15, 37 L. Ed. 2d 419. See Tr. 102-103, 104, 106-107, 111. Miller held at 413 U.S. at 24, 37 L. Ed. 2d at 431, that the following criteria must be considered in the definition of "hard core" obscenity:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient

interest, Kois v. Wisconsin, supra, at 230, 33 L Ed 2d 312, quoting Roth v. United States, supra, at 489, 1 L Ed 2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts, 383 US, at 419, 16 L Ed 2d 1;" (Emphasis original).

The trial court's correct instruction on obscenity, based on R.C. 2907.01(F) and Miller, did not prejudice appellant. Accordingly, appellant's second assignment of error is overruled.

"III. APPELLANT'S PROSECUTION VIOLATED HIS RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

In his third assignment of error, appellant argues that his prosecution for pandering obscenity violated his right to the equal protection of the laws. Appel-

lant's argument goes as follows: R.C. 2907.35[3/] grants a special defense to pandering obscenity to motion picture operators or projectionists who have no managerial responsibility or financial interest, other than wages, in their places of business. Appellant is similarly situated to projectionts who have been granted the R.C. 2907.35(C) defense because the record does not show him to have been anything but a nonmanagerial cashier at the All Adult Bookstore on September 25, 1975. The denial of the statutory defense to appellant is a denial of the equal protection of the laws Therefore, appellant's conviction and sentence must be set aside.

3/ R.C. 2907.35(C) provides:

"Sections 2907.31 and 2907.32 of the Revised Code do not apply to a motion picture operator or projectionist acting within the scope of his employemnt as an employee of the owner or manager of a theater or other place for the showing of pictures to the general public, and having no managerial responsiblity or financial interest in his place of employment, other than wages."

This court held in State v. Burgun (1976), 49 Ohio App. 2d 112, that R.C. 2907.35(C) was unconstitutional. Because R.C. 2907.35(C) was an amendment to R.C. 2907.35, we held that the excision of R.C. 2907.35(C) left unaffected the original statute forbidding the pandering of obscenity (R.C. 2907.32). 40 Ohio App. 2d 112, 124-127.

In view of our decision in State v. Burgun (1976), 40 Ohio App. 2d 112, we hold that appellant was not denied the equal protection of the laws because the special defense of R.C. 2907.35(C) is no longer available to similarly situated class of bookstore employees.

The third assignment of error is overruled.

"IV. THE NEWSPAPER IN ISSUE IS NOT LEGALLY OBSCENE."

We have reviewed the evidence and exhibits in this record. We cannot say

that the jury erred in finding that the subject issue of "Smut, The World's Dirtiest Paper" was obscene.

Upon independent review thereof we find that the subject issue of "Smut, The World's Dirtiest Paper" is obscene.

The fourth assignment of error is overruled.

Judgment affirmed.

Received for filing

Feb. 8, 1979

Gerald E. Fuerst

/s/ Peggy Moguel

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellant Procedure. Exceptions.

KRENZLER, J.

KRUPANSKY, J., CONCUR /s/ Thomas J. Parrino
Presiding Judge
Thomas J. Parrino

For plaintiff-appellee: Almeta A. Johnson
For defendant-appellant: Bernard A. Berkman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-747
	)	
Petitioner,	)	JUDGE JOHN M.
	)	MANOS
v.	)	
	)	
CLEVELAND MUNICIPAL	)	O R D E R
COURT, et al.,	)	[Entered Oct. 6,
	)	1980]
Respondents.	)	

The petitioner in this case, Frank Turoso, seeks a writ of habeas corpus under 28 U.S.C. §2254 from his conviction for pandering obscenity in violation of Ohio Revised Code §2907.32. On March 24, 1976 the petitioner was convicted in Cleveland Municipal Court, fined $1,000 and sentenced to 120 days in jail (sixth days of which were suspended). His appeal of the conviction to the Court of Appeals for the Eighth Appellate District was denied as was his motion for reconsideration. On December 7, 1978

the Supreme Court of the State of Ohio affirmed the petitioner's conviction, and on January 17, 1979 the court refused him a rehearing.

Before considering a petition for a writ of habeas corpus the federal court must determine, first, wether the petitioner is in custody, 28 U.S.C. §§2241 (c)(1) and 2254(a); and second, whether he has exhausted all his available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). The court finds that the petitioner is in custody, Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571 (1973), and that he has exhausted his state remedies. Fay, supra, and County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2231 (1979).

Deciding the jurisdictional prerequisites in his favor, the court must next consider the merit of the petition-

er's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims that the statute violates his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbroad and does not meet the test of constitutionality as announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio

St. 2d 354, 384 N.E.2d 255 (1978), and State v. Thomas, 57 Ohio St. 2d 71, 387 N.E.2d 229 (1979).

In Sovereign News this court measured the definitionof obscenity in force in Ohio against the standards enunciated in Miller. It concluded that Ohio Revised Code §2907.01 was unconstitutionally overbroad in four separate instances and was unconstitutionally vague. It did so only after carefully considering whether the statute was susceptible to an authoritative construction by the state courts which could cure the statute's constitutional infirmities.

Subsequent to this court's decision in Sovereign News, the Ohio Supreme Court decided State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978). In that case, the Ohio Supreme Court rejected overbreadth and vagueness challenges to Ohio

Revised Code §§2907.01 and 2907.32 and sustained constitutionality. The Ohio Supreme Court arrived at this result by simply incorporating the tripartite Miller test to the statute. This was done by leaving intact the five part disjunctive test of obscenity in Revised Code §2907.01 and adding to it at the end the three part conjunctive test of obscenity in Miller.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated by judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767,

97 S.Ct. 2085 (1977).

The petition for a writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-747
	)	
Petitioner,	)	JUDGE JOHN M.
	)	MANOS
v.	)	
	)	
CLEVELAND MUNICIPAL	)	FINAL JUDGMENT
COURT, et al.,	)	ORDER
	)	[Entered Oct. 6,
Respondents.	)	1980]

Pursuant to the memorandum attached to this Order, the petition for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

JANUARY TERM, 1978: [56 Ohio St.2d]

Statement of the Case

384 N.E.2d 255

THE STATE OF OHIO, APPELLEE v. BURGUN, APPELLANT
THE STATE OF OHIO, APPELLEE v. BAYLESS, APPELLANT
THE STATE OF OHIO, APPELLEE v. TUROSO, APPELLANT
THE STATE OF OHIO, APPELLEE v. KRUTE, APPELLANT

[Cite as State v. Burgun (1978), 56 Ohio St. 2d 354.]

Criminal law - Definitions of "obscenity" -Constitutionality-Conviction sustained, when-Indicia of scienter constitutionally adequate, when.

1. R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15.
2. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction undre R.C. 2907.32(A)(4).

(Nos. 77-1144, 77-1154, 77-1155, 77-1279-Decided December 7, 1978.)

APPEALS from the Court of Appeals for Cuyahoga County.

The appeals before this court are a consolidation of four cases which originated in Cleveland Municipal Court. The facts surrounding the convictions are similar and can be summarized as follows:

In each case, detectives of the Cleveland Police Department entered adult bookstores during normal business hours where the appellants were employed as cashiers or clerks. The police officers proceeded to the rear of the premises and viewed films in booths with coin-operated projectors of the "peep show" variety.

Having viewed the films and noted their location in the store, affidavits were drawn up describing in detail the sexual activity that took place on the screen. The affidavits were presented to a Municipal Court judge who issued search warrants authorizing the seizure

of both the films and the projectors. The items were seized and the appellants arrested and charged with pandering obscenity in violation of R.C. 2907.32 (A)(4).

Each appellant received a jury trial in Cleveland Municipal Court. The prosecution in each case consisted primarily of the testimony of the officers who had viewed the films and subsequently completed the affidavits. In addition, each film was admitted in evidence and shown to the jury. Pre-trial motions to suppress and dismiss were overruled as were motions for acquittal filed during the course of the trials.

All four appellants were convicted under the statute for pandering obscenity.

On appeal, the Court of Appeals affirmed the judgment of the trial court in all four cases.

The causes are now before this court pursuant to the allowance of appellants' motions to certify the record.

Ms. Almeta A. Johnson, police prosecutor, Bertsch, Edelman & Fludine Co., L.P.A., and Mr. Bruce A. Taylor, for appellee.

Messrs. Berkman, Gordon, Kancelbaum & Levy, Mr. Bernard A. Berkman and Mr. Joshua J. Kancelbaum, for appellants.

OPINION I

The appellants have raised seven propositions of law. The first four propositions apply to all four appeals. Propositions No. 5 and 6 apply only to State v. Burgun, case No. 77-1144, and likewise proposition No. 7 is concerned solely with State v. Krute, case No. 77-1279.

In their first proposition of law, appellants contend that the definition of obscenity contained in R.C. 2907.01 (F) and incorporated in R.C. 2907.32 (A) (4) is both overbroad and vague and therefore in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. The definition of "obscenity" set forth in R.C. 2907.01(F) reads as follows:

"When considered as a whole, and judged with reference to ordinary adults or, if

it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is 'obscene' if any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine sceintific, educational, sociological, moral, or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

The definition is incorporated into R.C. 2907.32(A)(4) which formed the basis for the prosecution in the present appeals and states, in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"***

"(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance when such performance is presented publicly, or when admission is charged ***."

The essence of the appellants' criticism is that the definition in R.C. 2907.01(F) is overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15 has been satisfied.

In that case the United Staets Supreme Court, at pages 24-25, described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact as

follows:

"*** As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes in a patently

offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * * If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." (Citations omitted; emphasis added.)

In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of

extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3) and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene.'" Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth. Finally, it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.

In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the

Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.

The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient.

Following that mandate this court was faced with a construction of the predecessors to the statutes under attack in the present case, R.C. 2905.34 and 2905.35, immediately following the Miller decision in State, ex rel. Sessenbrenner, v. Book Store (1973), 35 Ohio St.2d 220 and State, ex rel. Keating v. Vixen (1973), 35 Ohio St.2d 215.[1/]

1/ R.C. 2905.34(A)(1) through (4) stated, in pertinent part:

In Vixen this court held, at page 219, that the statutory definitions "comport with the standards enunciated in Miller." Similar language is found in Sensenbrenner, at page 221, where this court indicated:

"It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in Miller and the provisions of R.C. 2905.34 as guides for

---

1/ cont.

"(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adutls, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." (Emphasis added.)

determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance." The application of the Miller guidelines to Ohio obscenity law was also noted by this court in State, ex rel. Ewing, v. Without a Stitch (1974), 37 Ohio St.2d 95. In that case, the appellants had attacked the definition of nuisance contained in R.C. 3767.01(C) which, in turn, had incorporated the definition of obscenity upheld in Vixen, supra. This court repeated its prior holding and stated once again, at page 101, that " the definition of obscene material contained in R.C. 2905.34 comports with the constitutional definition of the word 'obscenity' as enunciated in Miller v. California * * *." Subsequently, on April 21, 1975, the United States Supreme Court summarily upheld that

decision by dismissing an appeal from one of the defendants for "want of a substantial federal question." Art Theater Guild, Inc., v. Ewing (1975), 421 U.S. 923.

The essence of these three Ohio decisions was not that the wording of R.C. 2905.34(A)(1) through (4) visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when comstrued in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contained the same disjunctive language currently under attack as well as being more general in its terms and definitions than its successor, R.C. 2907.01(F).

The United States Supreme Court has recently reinforced its policy of upholding facially overbroad state obscenity statutes that have been "narrowed" by an "authoritative construction" in light of the Miller guidelines. In Ward v. Illinois (1977), 431 U.S. 767, the United States Supreme Court was dealing with a state statute that had been patterned after the test for obscenity enunciated in Roth v. United States (1957), 354 U.S. 476.[2/]

As in the cases before this court, the statute was attacked as being unconstitutionally overbroad and vague. Yet, a close reading of that statute reveals

2/ The importance of Roth v. United States, supra, was also noted by the General Assembly in the passage of R.C. 2907.01(F) as indicated by the Committee Comment to that statute:

"The definition of obscenity is designed to meet the requirements of Roth v. United States * * *, and cases following in its wake. It spells out what is 'obscene' in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes."

a far more generalized description of obscenity than that found in R.C. 2907.01 (F). The statute reads, in pertinent part:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." Illinois Rev. Stat., Chapter 38, Section 11-20-(b) (1975).

The United States Supreme Court pointed out that subsequent to the Miller decision, Illinois Supreme Court decisions had proceeded to "construe" Section 11-20 of their Criminal Code to "incorporate" the guidelines in that decision. Id.,

at pages 774-75. As a result of that state Supreme Court's "response to Miller," the court indicated, at page 776, that it would not hold the Illinois statute to be "unconstitutionally overbroad."

This court, as previously noted in Vixen and Sensenbrenner, supra, has followed a somewhat similar "response to Miller" in its construction of R.C. 2905.34. Today, that "response" continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F).

We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court

construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller. In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in State v. Burgun, case No. 77-1144, where the

failure to instruct on Miller was reversible error.

II.

In their second proposition of law, the appellants argue that a judge must view films such as these prior to the issuance of any search warrant. Furthermore, if viewing the film is not possible the affidavits which form the basis of a subsequent warrant must reflect sufficient to satisfy the Miller test.

In order to issue a valid warrant the appropriate judicial officer must be able to "'focus searchingly on the question of obscenity.'" Roaden v. Kentucky (1973), 413 U.S. 496, 506. In addition, no cases have been cited where it has been specifically held that a judge or magistrate must view an alleged obscene film prior to the issuance of a search warrant. To make that procedure a

mandatory prerequisite to the issuance of a warrant would place an undue burden on an already overladen criminal justice system.

The affidavits in these cases were complete and specific in describing the sexual activity that took place in the films, as well as containing facts relating to the lack of titles, costs of operation, and running time. Taken as a whole, the affidavits contain sufficient facts to authorize a constitutionally sufficient warrant. Roaden, supra; Heller v. New York (1973), 413 U.S. 483. The Municipal Court judge in each instance herein had a full opportunity to make an independent judicial determination of probable cause prior to issuing the warrants and to "focus searchingly on the question of obscenity" in light of the Miller test.

This proposition of law is overruled.

III.

In their third proposition of law, appellants argue that knowledge of both the content and the character of the films is required to satisfy the scienter element for pandering obscenity in R.C. 2907.32. In addition, it is alleged that the circumstantial evidence presented at the trials did not support a finding that the appellants had the requisite mens rea.

The requirement of some degree of scienter to sustain an obscenity conviction such as those before this court was clearly mandated by Smith v. California (1959), 361 U.S. 147. However, the United States Supreme Court did not limit the states by spelling out the particular type of mens rea that would be constitutionally sufficient.

The predecessor to the current statute on pandering obscenity was R.C. 2905.35, which was specifically worded so as to

require "knowledge of the content and character" of obscene material as a prerequisite to prosecution.[3] The necessity of finding knowledge of the "content" of the material was further reinforced by this court's decision in State, ex rel. Ewing, supra. However, by requiring that knowledge of the "content" of obscene material is necessary,

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3/ R.C. 2905.35 stated, in pertinent part:

"No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

"Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years or both." (Emphasis added.)

this court did not imply that there be either knowledge of the actual content or the fact that it was legally obscene. See Rosen v. United States (1896), 161 U.S. 29.

The current statute under which these appellants were convicted, R.C. 2907.32 (A), describes the requisite element of scienter as follows: "No person, with knowledge of the character of the material or performance involved, shall do any of the following * * *." (Emphasis added.) Furthermore, R.C. 2907.35 (A) (2) described a situation when a rebuttal presumption of that "knowledge" will arise:

"(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commerical establishment engaged in selling materials or exhibiting performances who, in the course of business:

"* * *

"(2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its contents." (Emphasis added.)

As indicated by the statutory language, "precise knowledge" of "contents" is unnecessary and instead the emphasis is on "notice" of the "nature" of the material.

Knowledge of the "character" or "nature" of obscene material has been held to be a constitutionally adequate indicium of scienter to uphold an obscenity conviction. Mishkin v. New York (1966), 383 U.S. 502, rehearing denied 384 U.S. 934; United States v.

Hill (C.A. 5, 1974), 500 F.2d 733, certiorari denied 420 U.S. 952; United States v. Groner (C.A. 5, 1974), 494 F.2d 499, certiorari denied 419 U.S. 1010; United States v. Thevis (C.A. 5, 1973), 484 F.2d 1149, certiorari denied 418 U.S. 932, rehearing denied 419 U.S. 886. In light of the foregoing we conclude that "knowledge of the character of the material" is sufficient to sustain a conviction under R.C. 2907.32(A)(4).

In proving a defendant had knowledge of the character of obscene material the state may rely solely on circumstantial evidence. Smith v. California, supra at page 154; State v. American Theatre Corp. (1975), 193 Neb. 289, 227 N.W. 2d 390. A survey of the records in these four appeals reveals that the appellants were all involved in the operation of the bookstores as cashiers or clerks. Their

position placed them in the front of the premises where they were in full view of sexually oriented magazines, books, artificial sexual aides and related sexual paraphernalia located in display cases. The movies were shown in the rear of the premises in booths with coin-operated projectors.

As employees responsible for selling these materials and dispensing change to customers, the evidence presented is sufficient so that a jury could have inferred beyond a reasonable doubt that the appellants had knowledge of the character of the films being shown. Appellants' third proposition of law is overruled.

IV

In the appellants' fourth proposition of law, claim is made the R.C. 2907.35 (C), providing a qualified exemption for

projectionists who have neither a financial interest in their place of employment nor any managerial responsibilities over its operation, violates the Equal Protection Clause of the Fourteenth Amendment.

Before an individual can challenge state legislation as violative of the federal constitution he must bring himself within the class affected by the unconstitutional feature. Arkadelphia Co. v. St. Louis S. W. Ry. Co. (1919), 249 U.S. 134, 149. In other words, a person who is seeking to raise the issue of the validity of a discriminatory enactment has no standing for that purpose unless he belongs to the class which is prejudiced by the statute. Witham v. South Side Bldg. & L. Assoc. (1938), 133 Ohio St. 560; Anderson v. Brown (1968), 13 Ohio St. 2d 53.

It is uncontroverted that none of the appellants offered proof at the trial

court level to show that they were in a position similar to that of the projectionists. There is insufficient probative evidence in the record to establish that a proper person has brought himself within the class of persons standing in the same position as the statutorily exempted projectionists.

Appellants' fourth proposition of law is overruled.

V

Proposition of law No. 5 relates solely to State v. Burgun, Case No. 77-1144. Appellant Burgun alleges that in a prosecution under R.C. 2907.32 it is error for a trial court to fail to instruct the jury on the definiton of obscenity established in Miller v. California, supra. The trial judge instructed the jury solely under the statute. Pursuant to the discussion

in Part I of this opinion the failure to give a narrowing instruction was reversible error.

VI

In proposition of law No. 6, appellant Burgun alleges that it was error for the trial court both to fail to dismiss a complaint under R.C. 2907.32(A)(4) which lacks an allegation that the accused had knowledge of the "content" of the allegedly obscene material and to fail to instruct the jury on the necessity of such knowledge. In light of the discussion of the degree of scienter required for a prosecution under this statute in Part III of this opinion knowledge of the "character" of the material is all that is necessary. Appellant Burgun's proposition of law is overruled.

VII.

The seventh proposition of law relates solely to State v. Krute, case No. 77-1279. Appellant Krute argues that certain remarks made by the prosecutor in his closing argument were so prejudicial they deprived him of his right to a fair and impartial trial. The appellant claims the prosecutor urged the jury to convict him to help stamp out obscenity, injected his own personal views, and argued points unsupported by the evidence.

Upon a careful review of the record it is evident, as the Court of Appeals noted, that some of the remarks made by the prosecution were improper. However, there is no evidence in the record that indicates that they were so prejudicial or inflammatory as to deprive this appellant of his constitutional right to a fair trial. This proposition of law is overruled.

The propositions of law that relate to State v. Bayless, case No. 77-1154; State v. Turoso, case No. 77-1155; and State v. Krute, case No. 77-1279 are not well-taken and those judgments are affirmed. Proposition of law No. 5 relating to State v. Burgun, case No. 77-1144, is well-taken. The judgment of the Court of Appeals in case No. 77-1144 is reversed and that cause is remanded for a new trial in accordance with the foregoing opinion.

Judgment accordingly.

Leach, C.J., Herbert, P. Brown, Sweeney and Locher, J J., concur

W. Brown, J. concurs in case No. 77-1144, but dissents in cases Nos. 77-1154, 77-1155 and 77-1279.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 36368

State of Ohio,
City of Cleveland

PLAINTIFF-APPELLEE

-vs-

Frank Turoso

DEFENDANT-APPELLANT

APPEAL FROM
Cleveland Municipal Court

No. 75 CRB 17311

JOURNAL ENTRY
AND OPINION

DATE July 14, 1977

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

STILLMAN, P.J.:

The appellant, Frank Turoso, was charged on July 5, 1975, with pandering obscenity in violation of R.C. 2907.32 (A)(4). The applicable portions of that section of the Code provide that:

> "No person, with knowledge of the character of the material or performance involved, shall . . . present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged...."

On July 18, 1975, the appellant moved to suppress the physical evidence in the case, which evidence consisted of an 8 mm. movie film and projector seized by cfficers pursuant to a search warrant.

The affidavit for a search warrant was made out by Patrolman John McNamara, and contained the following language:

> "8mm move film, no title, in color, with explicit scenes of fellatio and cunnilingus, as outlined on reverse side. Admission 25 cents per viewing, per 1 1/2 minutes, in booth #16, 'A' coin receptacle . . . used as a means of the commission of crime and/or such objects or articles are in

the possession of one John or Jane Doe and/or unknown persons with the intent to use the same as a means of committing crime, to-wit: Pandering Obscenity . . . ."

* * *

"Said affiant further says that John Doe (Real Name Unknown) did unlawfully have in his possession said personal property as aforesaid: 8 mm movie film and projector as outlined above and on reverse side."

On the reverse side of the affidavit was typed the following:

"Location:	3141 West 25th dba Adult Book Store
"Time:	11:05 AM, Wednesday, July 2, 1975
"Evidence Viewed:	8mm movie film, in color, no title, more specifically located in Booth #16, 'A' coin receptacle.
"Viewing Time:	Approximately 9 minutes; 25 cents operated per 1 1/2 minutes.
"Viewed By:	Ptl. John McNamara #1607

"Material content of the 8mm movie film viewed is hard core obscenity, participants are two males and two females. One of the females is committing fellatio on the two males

at the same time. It then shows the two males jacking off and the female lying down in front of them licking her lips. After a time one of the males ejaculates into her mouth and on the chin. The other female then licks the chin and kisses the above mentioned female. She then commits fellatio on the male that hasn't ejaculated yet. While she is doing this the other male and female and [sic] playing with her vagina. The female then commits cunnilingus on her. The the other male ejaculates into the mouth of the female. The two females then kiss and embrace again.

"The entire contents of the movie, with explicit scenes of fellatio and cunnilingus, as outlined above is hard core obscenity as our guide lines of Pandering Obscenity by the Law Department and Prosecutor's Office." 1/

On July 3- 1975, Judge Salvatore R. Calandra of the Cleveland Municipal Court signed the warrant authorizing a search of the Adult Book Store and seizure of the film and projector referred to in the affidavit.

1/ The evidence offered at the motion hearing has been provided to the Court of Appeals by "Stipulation to Correct the Record Pursuant to Rule 9 (E) of the Rules of Appellate Procedure."

At the hearing on the motion to suppress, held on August 13, 1975, the parties stipulated to the following:

> "1. The judge who issued the warrant was not shown the film whose seizure was authorized prior to issuing the search warrant.
>
> "2. The affiant did not describe the film's contents except as appears on the affidavit for search warrant and the search warrant itself.
>
> "3. The officer-affiant has produced a true copy of the affidavit and search warrant, and the same may be admitted without objection."

The appellant's motion to suppress was denied on October 8, 1975.

The case proceeded to trial before a jury of eight on February 26 and 27, 1976. Patrolman John McNamara recounted his July 2, 1975, visit to the Adult Book Store. He stated that he had viewed sexually oriented magazines on the walls, and various sexual devices and paraphernalia in a showcase near the clerk's desk.

The store contained an area of booths in which movies could be viewed privately by persons over 21, and on the wall near them was a description of the films in each booth. McNamara viewed the film in booth number 16. He described the film's contents to the jury, who thereafter viewed it themselves. It was after the July 2 visit that McNamara made out the affidavit for a search warrant which was taken before Judge Calandra on July 3.

McNamara testified that he returned to the Adult Book Store on July 3, armed with the search warrant. At that time, the appellant was "the clerk . . . [b]ehind the counter." (Tr. 164). Upon being placed under arrest, Turoso locked the store with keys taken out of his pocket. The projector and film had been in a locked cabinet, which the police had

the use a crowbar to open.

At the conclusion of the State's case, the appellant moved for a judgment of acquittal, which was denied (Tr. 187, 215). The motion was renewed at the conclusion of all the evidence, and again denied (Tr. 259, 262).

The evidence offered by the defense tended to show that certain magazines, characterized as containing "explicit sexual activity" (Tr. 219) could be, and had been legally purchased at Cleveland Hopkins Airport.[2/] Although there was some confusion in the testimony of an assistant director of law of the City of Cleveland, it appeared that the commissioner of Airports of the City of Cleveland possessed the right to determine that merchandise sold at the Airport

2/ The magazines, marked as Defendant's Exhibits B-E, were titled Viva, Foxy Lady, Club and Penthouse, and bore different issue dates.

was inappropriate, and could require that it not be sold.

On February 27, 1976, the jury found the appellant guilty of pandering obscenity. It is from this conviction that he has perfected his appeal, presenting the following assignments of error:

"I. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS THE FILM AND PROJECTOR BECAUSE THE SEIZURE OF THESE ITEMS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

"II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL TESTIMONY BECAUSE THE STATE FAILED TO OFFER SUFFICIENT EVIDENCE TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

"III. THE STATUTE PURSUANT TO WHICH THE APPELLANT WAS CHARGED AND CONVICTED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

"IV. APPELLANT'S PROSECUTION VIOLATED HIS RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"V. THE FILM IN ISSUE IS NOT LEGALLY OBSCENE."

The appellant has divided his discussion under assignment of error number one into two arguments, as stated below:

"A. Seizure of the Film and Projector Violated Appellant's Fourth Amendment Rights Because the Affidavit Offered In Support of the Search Warrant Failed to Establish Probable Cause."

We find this argument to be without merit. The affidavit provided sufficient information to the magistrate to allow him to determine probable cause by "focus[ing] searchingly upon the question of obscenity" Heller v. New York (1973), 413 U.S. 483, 489; 93 S.Ct. 2789, 2793. Obscenity is determined by use of the following guidelines set out in Miller v. California (1973), 413 U.S. 15; 93 S.Ct. 2607:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin,

supra, 408 U.S. , at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Unlike the situation in State v. Turoso, No. 34623 (Ct. of App. Cuy. Cty., April 8, 1976), in the case before us, all three criteria were satisfied by the affidavit including (c). Because the affidavit sets forth a description of the entire film, the judge issuing the warrant had the opportunity to take the work as a whole into consideration in determining whether it lacked "serious literary, artistic, political, or scientific value." The requirement of a "searching focus" was met in the instant case.

"B. Seizure of the Film Violated Appellant's First and Fourth Amendment Rights Because the Judge who Issued the Warrant had not been Shown the Film Prior Thereto."

This argument has been addressed by the Court of Appeals in State v. Turoso, supra. In that case, the court specifically held "that a magistrate is not required to view a film alleged to be obscene prior to issuing a warrant." Id. at 4.

We reject the first assignment of error.

In his second assignment of error, the appellant argues that the State failed to present evidence of an essential element of the crime charged, and that the court should, therefore, have granted his motion for a judgment of acquittal. In the first instance, the appellant has incorrectly described this essential element of pandering obscenity.

R.C. 2907.32(A) reads as follows: "[n]o person, with knowledge of the character of the material or performance involved ...." (Emphasis added). The complaint is worded in the same way. Although the appellant insists that an element of the crime is "knowledge of the character and content of the material involved,"[3] we will address ourselves to the appellant's argument as though he had properly set forth the scienter element of pandering obscenity.

No direct evidence of the appellant's knowledge of the character of the material

3/ The court's charge incorrectly informed the jury that "the complaint states that... Turoso did, with knowledge of the character and content of the performance involved...." The court went on to state that the first element to be proven was "knowledge of the character and content." That language required of the State a higher degree of proof than required by the statute. Because it was thus prejudicial to the State, the appellant cannot be heard to complain of its usage.

or performance involved was offered at trial. However, it has been held by the Supreme Court that:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Smith v. California (1959), 361 U.S. 147, 154; 80 S.Ct. 215, 219.

Clearly, the circumstances presented in this case warrant the inference that a person working in a bookstore of this kind was aware of the character of a movie being shown on the premises. To reach any other conclusion is to commit a legal and factual absurdity. The jury's inference was supported by the evidence.

Testimony revealed that on the outsdie of the store signs proclaimed that this was an "all adult book store", and

that no minors were allowed. On the wals inside the store, magazines showed males and females in various poses and states of undress. Some of the sexual devices in the store were displayed in a showcase at the side of the clerk's desk, and the evidence indicated that Turoso was the clerk. The area in which the films were shown may have had a sign requiring persons to be at least 21 years old to enter (Tr. 148). Although no projectionist was required to operate the films, Mr. Turoso had a "direct line of vision" to the area where they were shown. In addition, a schedule on the wall described those films. After the appellant was arrested, he checked the rear of the store to see if any customers were there, and locked up the store with the keys in his possession. As in State v. Burgun (1976), 49 Ohio App. 2d 112,

121, we find that:

> "[T]he State might have done a better job in proving that the appellant had knowledge of the character of the movies, [but that] from the evidence presented at the trial the jury could have inferred beyond a reasonable doubt that the appellant had knowledge of the character of the movie."

We, therefore, overrule the appellant's second assignment of error.

In his third assignment of error, the appellant urges this court to reverse its decision in State v. Burgun, supra, and hold that Ohio's obscenity statute is overbroad and vague. This the court refuses to do. Obscenity is defined by R.C. 2907.01(F) as follows:

> "When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is 'obscene' if any of the following apply:
>
> "(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

In State v. Burgun, id. at 123, this court held that the statute was not vague,

but "extremely precise in defining what conduct is prohibited."

With regard to overbreadth, Burgun states that although R.C. 2907.01(F) might not incorporate all of the elements of obscenity as defined in Miller v. California, supra, "[a] state statute which does not meet the standards of Miller may still be valid if the Miller tests are incorporated into the statutory definition of obscenity by judicial construction." Id. at 123. In the instant case, the court charged the jury on the statutory definition of obscenity, and in addition, instructed the jury on the Miller tests. Therefore, as in Burgun, the appellant was not prejudiced. The third assignment of error is without merit.

Appellant's fourth assignment of error alleges that he was denied equal protection of the law in violation of the Fourteenth Amendment of the Constitution.

He divides his argument into two subparts:

> "A. The Existence of the Invalid Exception at the Time of His Arrest and Prosecution Violated Appellant's Rights; the Burgun Result Must Apply Prospectively Only."

This court, in State v. Burgun, supra, struck down the following statutory provision as being violative of the equal protection clause:

> "2907.35...(C) Section...2907.32 of the Revised Code do[es] not apply to a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages."

The appellant argues that the existence of such a statutory exception at the time of the appellant's prosecution created a situation in which he was denied equal protection, because projectionists were then exempt from similar prosecu-

tions. However, this court has already spoken to this argument in Burgun. The appellant in Burgun was in the same position as the appellant in the instant case. By refusing to hold that Burgun's prosecution under a statute containing an invalid exception for projectionists denied him equal protection, this court has rejected such an argument. We do so again.

"B. The Unconstitutionality of the Exception Necessitates the Invalidation of the Entire Statute."

The appellant maintains that R.C. 2907.32 must be struck down in light of the fact that the court has found the exception enunciated in R.C. 2907.35(C) to be unconstitutional. This court is unwilling to change its position as stated State v. Burgun, in which it was held that "R.C. 2907.35(C) is invalid and must fall, but R.C. 2907.32 is still

valid and of full force and effect." Id. at 127. The fourth assignment of error is without merit.

In his final assignment of error, the appellant argues that the film was not legally obscene. After viewing the film, this court is of the opinion that under the criteria established by Miller v. California, supra, the film is indeed obscene.

Material is obscene if to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest in sex, if it is utterly without redeeming social importance and if it is patently offensive because it goes beyond customary limits of candor in description or representation of sexual matters, State v. Valchar (1973), 34 Ohio App. 2d 21.

The film which we have considered in the instant case meets the description in Valchar, supra, and in Miller, supra, containing nothing of literary, artistic, political or scientific value to redeem it from the proscription of obscenity.

The fifth assignment of error, therefore, is not well taken.

For the foregoing reasons, the judgment of the trial court is affirmed.

July 14, 1977

Gerald E. Fuerst

By/s/ Peggy Moguel

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STILLMAN, P.J.

PRYATEL J.,

PATTON, J., CONCUR.

JOURNALIZED Aug. 9, 1977

GERALD E. FUERST, Clerk of Courts

By/s/ R. Hakism Deputy

/s/Saul G. Stillman

Presiding Judge

SAUL G. STILLMAN

For plaintiff-appellee: Almeta A. Johnson
For defendant-appellant: Bernard A. Berkman

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FRANK TUROSO	)	C79-1010
	)	
Petitioner	)	[Entered Sept.
	)	15, 1980]
v.	)	
	)	
THE CLEVELAND MUNICIPAL COURT, et al.	)	

MEMORANDUM AND ORDER

THOMAS, J.

Challenging his conviction by a Cleveland Municipal Court jury for pandering obscenity (O.R.C. §2907.32(A)(2)) and his consequent sentence, Frank Turoso petitions this court for a writ of habeas corpus (28 U.S.C. §2254). Petitioner contends that he was convicted and sentenced in violation of his First and Fourteenth Amendment rights. He says that O.R.C. §2907.32(A) and §2907.01 (which defines obscenity and therefore must be read with the former section)

are unconstitutionally vague and over-broad.

Convicted on April 29, 1977, Frank Turoso was sentenced to six months in jail and fined $1,000. The Ohio Court of Appeals (Eighth District) affirmed that conviction on April 26, 1979. Petitioner did not appeal his conviction to the Ohio Supreme Court. Instead, he filed his habeas corpus petition in this court.

Magistrate Streepy, to whom the case was referred for a report and recommended decision, concluded:

> It is arguable that [the R.C. 2907.01] definition of sexual conduct, considered in combination with the element of "patently offensive" in part (b) of the [Miller v. California, 413 U.S. 15 (1973)] guidelines, comes within the examples of "hardcore" sexual conduct set forth in Miller, at p. 25, which the state may constitutionally regulate.

Nevertheless, the magistrate recommended that the petition for a writ of habeas corpus be granted on the following ground:

> The court in peitioner's case did instruct the jury in the language of the three-part Miller standard; but did not specifically define "sexual conduct" in part (b) of the standard pursuant to the applicable state law. Thus the court did not define sexual conduct in terms of the two examples in Miller, at p. 25, nor did the court define sexual conduct as it appears in Ohio Revised Code §2907.01(A). Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. Sovereign News Co., [448 F.Supp. 306, 400 (N.D. Ohio 1977, Manos, J.)]

The subjects of the two recommended rulings of the magistrate will be covered in the memorandum of this court. The first recommended ruling need not be discussed because this court hereafter concludes that the Ohio obscenity law is constitutional as construed by the Ohio Supreme Court in light of Miller v. California, 413 U.S. 15 (1973), and Ward v. Illinois, 431 U.S 767 (1977).

The second recommended ruling of the magistrate, not adopted by this court, will be discussed.

I.

A.

Two jurisdictional issues are raised by this habeas corpus petition. First, since the petitioner has not yet begun to serve the sentence of six months or pay the $1,000 fine imposed upon him, is he "in custody" within the meaning of 28 U.S.C. §2254? An entry in the case transcript reads:

> Mandate received from Court of Appeals. Judgement affirmed. Sentence stayed. Same bond. [$5,000 surety bond] pending resolution of habeas corpus in U.S. District Court.

Hensley v. Municipal Court, 411 U.S. 345 (1973), held that a person released on bond (personal recognizance in Hensley) is in "custody" within the meaning of

the federal habeas corpus statute, 28 U.S.C. §§2241(c)(3), 2254(a). But for the staying of the sentence by the state court, and his continued release on surety bond, the petitioner would be serving the Cleveland Municipal Court's sentence. Hence, under Hensley, he is "in custody."

However, Hensley emphasizes that a state defendant "released on bail or on his own recognizance pending trial or pending appeal...must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts." This raises a second jurisdictional question.

While 28 U.S.C. §2254(b), (c) provides that a petition for writ of habeas corpus by a person in state custody will not be granted unless state court remedies have been exhausted, Lucas v.

People of State of Michigan, 420 F.2d 259, 261 (6th Cir. 1970), recognizes that "the exhaustion requirement is not absolute." When a state court's rulings are settled and there is no reason to believe that a state's appellate courts are prepared to depart from those rulings, Lucas holds that "to require [a petitioner] to exhaust [the] remedies in the State courts would be an exercise in futility." Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978), approved and followed Lucas.

In State v. Thomas, 57 Ohio St. 2d 71, 387 N.E. 2d 229 (1979), a per curiam opinion, the Supreme Court of Ohio reviewed the Akron Municipal Court's dismissal of a pandering obscenity (R.C. 2907.32) charge. The dismissal had been affirmed by the Summit County Court of Appeals on the ground that R.C. 2907.32

and 2907.01(F) (defining obscenity) are "unconstitutionally overbroad and vague." In reversing the court of appeals "on the authority of and for the reasons stated in State v. Burgun, 56 Ohio St. 2d 354 (1978), 384 N.E.2d 255," the Ohio Supreme Court reaffirmed the ruling that R.C. 2907.01(F) "is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15 (1973), 93 S.Ct. 2607, 37 L.Ed. 419." Thus, to require petitioner to exhaust his remedies through the Ohio Supreme Court when its adjudication of constitutionality is predictable would be the "judicial runaround" which Lucas finds to be futile and unnecessary.

B.

Miller v. California formulated three "basic guidelines for the trier of fact,"

and the statement of these guidelines in the conjunctive requires each to be established:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious litarary, artistic, political, or scientific value.

Id., at 24.

Preliminary to the formulation of the guidelines, the Court had stated:

> We acknowledge...the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited...As a result, we now confine the permissbile scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.

Id., at 24.

The Court elaborated upon part (b) of the guidelines by giving examples of sexual conduct, the depictions of which could be defined and regulated by a state:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.

Id., at 25. The Court was careful to point out that "[w]e do not hold... that all States...must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate." Id., at 24, n. 6. Allowance was made, indeed permission was given, for state courts to "authoritatively construe" their obscenity statutes to bring those statutes into conformance with Miller.

The Court ruled:

> If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary (citations).

Id., at 25.

In Ward v. Illinois, 431 U.S. 767 (1977), the Court was faced with a pre-Miller statute. Ill.Rev.Stat. ch. 38, §11-20(b) thus defined obscenity: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters...." It was argued in Ward that the statute was unconstitutionally vague

bacause it failed to specifically define the sexual conduct which could not be "depicted in a patently offensive way."

The argument was rejected on several grounds. In cited decisions of the Illinois Supreme Court that predated the sales for which Ward was prosecuted, the Court noted that "[m]aterials such as [Ward sold], which by title or content may fairly be described as sado-masochistic, had been expressly held to violate the Illinois [obscenity] statute...." Id., at 771. Thus there was "notice that materials dealing with the kind of sexual conduct involved [in Ward] could not be legally sold in [Illinois]."

In a case remanded under Miller, People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264, 270 (1974), the Illinois Supreme Court construed section 11-20 "to incorporate parts (a) and (b) of

the Miller standards." In Ridens, the court neither expressly adopted nor set forth the Miller "examples."

By the Illinois court's incorporating part (b) of the Miller guidelines into the Illinois statute, the Court reasoned that,

> The Illinois court thus must have been aware of the need for specificity and of the Miller Court's examples explaining the reach of part (b). See id., at 25.

Since the "Illinois court plainly intended to conform the Illinois law to part (b) of Miller," the Court concluded, "[T]here is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the Miller examples, which gave substantive meaning to part (b) by indicated the kinds of materials within its reach." Ward, supra, at 775. The Court then added:

> The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in Miller.

Id., at 775. Thus, the Court held that the incorporation of part (b) of the Miller guidelines impliedly incorporated the Miller patently offensive "examples" into the Illinois obscenity law. However, these "specifics were offered merely as 'examples,'" 413 U.S. at 25; and as later pointed out in Hamling v. United States, 418 U.S. 87, 114 (1974), they "were not intended to be exhaustive."

The conclusions of the Court in Ward are no less an independent ground of decision because the Court thereafter found reinforcement for these conclusions in the later Illinois decision of People v. Gould, 60 Ill.2d 159, 324 N.E.2d 412

(1975). The Court noted that Gould quoted a passage from Miller which "contains the explanatory samples as well as the guidelines" and that Gould then stated that "Ridens had construed the Illinois statute to include parts (a) and (b) of the Miller guidelines, and it expressly referred to the standards set out in the immediately preceding quotation from Miller." The Court then held:

> Because the quotation contained not only part (b) but the examples given to explain that part, it would be a needlessly technical and wholly unwarranted reading of the Illinois opinions to conclude that the state court did not adopt these explanatory examples as well as the guidelines themselves.

431 U.S. at 775-76. The Court further held:

> Given that Illinois has adopted Miller's explanatory examples, what the State has done in attempting to bring its statute in conformity with Miller is surely as much as this Court did

> in its post-Miller construction of federal obscenity statutes. In Hamling v. United States, 418 U.S. at 114, we construed 18 U.S.C. §1461, which prohibits the mailing of obscene matter, to be limited to "the sort of" patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in Miller.

Id., at 776.

Hence, the question of meeting the constitutional statutory specificity requirement depends upon whether the Ohio statute, section 2907.01(F), has been authoritatively construed by the Ohio courts to incorporate the Miller three-part guidelines and if so, whether the incorporation of the Miller examples may be implied therefrom.

C.

O.R.C. 2907.01(F) thus defines "obscene":

> (F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates

or other specially susceptible group, judged with reference to such group, any material or performance is "obscene"if any of the following apply:

(1) Its dominant appeal is to prurient interest:

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a

> dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

The petitioner has not filed any comment on the magistrate's recommended report. However, the petitioner argues in his written submission to the magistrate that the section 2907.01(F) definition of obscenity is unconstitutionally overbroad and vague because it does not comply with the standard articulated by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). He argues that the statute is written in the disjunctive rather than the conjunctive, allowing for prosecution upon the finding of any one of the five characteristics listed within section 2907.01 (F). He further argues that depictions

proscribed by section 2907.01(F) include violence and mere nudity, both of which are protected.[1] Finally, petitioner claimed that the statute does not define with the requisite specificity the sexual conduct which may not be depicted because it is patently offensive.

Respondents Cleveland Municipal Court and the Honorable Salvatore R. Calandra have filed objections to the report of the magistrate. In sum, they argue that the Ohio Supreme Court has construed the Ohio obscenity law to incorporate the Miller guidelines and that necessarily the incorporation includes the Miller examples of patently offensive sexual conduct. Since such incorporation was presumed by the United States Supreme Court in upholding the Illinois obscenity

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[1] In Jenkins v. Georgia, 418 U.S. 153, 161 (1973), the Court stated, "[N]udity alone is not enough to make material legally obscene under the Miller standards."

law in Ward v. Illinois, 431 U.S. 767 (1977), the same presumption of incorporation of the Miller "examples" sustains the Ohio obscenity law against petitioner's attack, it is urged.

In State v. Burgun, 56 Ohio St 2d 354, 384 N.E.2d 255, (1978), the Ohio Supreme Court had before it appeals of four persons, each convicted by a jury in Cleveland Municipal Court of pandering obscenity in violation of O.R.C. 2907.32 (A)(4).[2] The defendants were cashiers or clerks in adult bookstores located in Cleveland. In each situation police

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[2] O.R.C. 2907.32(A)(4), in pertinent part provides:

(A) No persons with knowledge of the character of the material or performance involved, shall do any of the following:

****

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged....

viewed movies in coin operated projectors located in booths at the rear of the premises. Later, pursuant to search warrants, the movies were seized, admitted into evidence, and viewed by the jury.

Each appellant charged that the definition of obscenity, which must be read together with R.C. 2907.32(A)(4), is

> overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. [Supra, at p.9] Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15, has been satisfied.[3]

---

[3] At p. 358, the court extends appellants' criticism of section 2907.01(F):

> In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute

The Burgun court's familiarity with the Miller guidelines is revealed in its

3 cont.
conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3), and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene'." Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth. Finally it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.

In Sovereign News Company v. Falke, 448 F.Supp. 306, 400 (N.D. Ohio 1977, Manos, J.), the court found that in four separate instances, "section 2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression." These instances are the same as the foregoing challenges to section 2907.01 (F).

quotation of those guidelines. The court's familiarity with the Miller "examples" must be inferred also from the fact that the court refers to p. 25 of the Miller opinion (on which page the Miller "examples" are set forth). The court stated:

> In that case, the United States Supreme Court, at pp. 24-25, described the permissible scope of state regulation of obscenity and the three-prong inquiry to be adopted by the trier of fact as follows: [guidelines thereupon quoted].

56 Ohio St. 2d at 357-58, 384 N.E.2d at 259. As prologue to the court's statement of its intention to read the Miller guidelines in pari materia with section 2907.01(F), the court next stated:

> In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.

> The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient."

Id., at 358, 384 N.E.2d at 259.

The Ohio Supreme Court then noted that following the Miller mandate it "was faced with a construction of the predecessors to the statutes under attack in the present case, R.C. 2905.34 and 2905.35,[4] immediately following the Miller decision in State, ex rel.

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[4] Effective January 1, 1974, Ohio adopted a new criminal code including a rewriting of its obscenity laws. The predecessor section O.R.C. 2905.34(A) was substantially readopted, but one subparagraph, as O.R.C. 2907.01(F), was added. Thus for present purposes, the predecessor definition of obscenity, O.R.C. 2905.34, and the present definition of obscentiy, O.R.C. 2907.01(F), have substantially the same wording. Both are written in disjunctive rather than conjunctive language.

Sensenbrenner, v. The Book Store, (1973), 35 Ohio St. 2d 220, and State, ex rel. Keating, v. Vixen, (1973), 35 Ohio St. 2d 215." Reviewing those decisions, the court observed that in Vixen at p. 219 it had held "that the statutory definitions 'comport with the standards enunciated in Miller'" and that similar language was found in Sensenbrenner at p. 221 where it indicated:

> It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in Miller and the provisions of R.C. 2905.34 as guides for determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance.

Id., at 358, 384 N.E.2d at 260.

Continuing, the court observed that "[t]he application of the Miller guidelines to Ohio's obscenity law was also noted by this court in State, ex rel. Ewing, v. Without a Stitch (1974), 37

Ohio St. 2d 95." The court then held:

> The essence of these three Ohio decisions was not that the wording of R.C. 2905.34(A)(1) through (4) visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when construed in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contains the same disjunctive language currently under attack as well as being more general in its terms and definitions than its successor, R.C. 2907.01(F).

Id., at 360, 384 N.E.2d at 260. Citing Ward v. Illinois, 431 U.S. 767 (1977), the Ohio Supreme Court correctly characterized that case as a reinforcement of the United States Supreme Court policy "of upholding facially overbroad state obscenity statutes that have been 'narrowed' by an 'authoritative construction' in light of the Miller guidelines."

Before considering whether Ohio has incorporated the Miller guidelines in

accordance with Ward v. Illinois, an earlier aspect of the Ward decision is pertinent here and should be mentioned. Ward v. Illinois noted that by virtue of earlier Illinois Supreme Court decisions "appellant had ample guidance from the Illinois Supreme Court that his conduct did not conform to the Illinois law." Id., at 771. Although the reference was to movies rather than magazines (a distinction without a difference), in State, ex rel. Keating, v. Vixen, 27 Ohio St. 2d 278, 285, 272 N.E.2d 137, 141-142 (1971) (Vixen I), the Ohio Supreme Court announced:

> Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof "for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose" is forbidden by Ohio law.

On remand by the Supreme Court of the United States of the same case for further

consideration in light of Miller v. California, the court in State, ex rel. Keating, v. "Vixen", 35 Ohio St. 2d 215, 218, 301 N.E.2d 880, 882 (1973) (Vixen II), repeated and approved the last quoted statement.

With express notice that "depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof...is forbidden by Ohio law," and given the content of the magazine "Sexual Fantasies," described infra in part II, petitioner Turoso had full and direct notice that the commercial exploitation of the depictions of sexual acts contained in such magazines is likewise "forbidden by Ohio law."

To return to the matter of the incorporation of the Miller guidelines in the Ohio obscenity law, the Ohio Supreme Court noted what happened in Ward v. Illinois:

> The United States Supreme Court pointed out that subsequent to the Miller decision, Illinois Supreme Court decisions had proceeded to "construe" section 11-20 of their Criminal Code to "incorporate" the guidelines in that decision. Id., at 774-75. As a result of that state Supreme Court's "response to Miller," the court indicated, at p. 776 that it would not hold the Illinois statute to be "unconstitutionally overbroad."

Id., at 361, 384 N.E.2d at 260-61. After observing that it had followed "a somewhat similar 'response to Miller' in its construction of R.C. 2905.34" in Vixen and Sensenbrenner, the court stated, "Today, that 'response' continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F)." The Ohio Supreme Court then held:

> R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state

> court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

Id. at 361, 384 N.E.2d at 261.

Thus it is seen that the Ohio Supreme Court has incorporated the Miller guidelines into O.R.C. 2907.01(F) "by an 'authoritative' state court construction." As seen earlier, in State v. Thomas, the Ohio Supreme Court reaffirmed its Burgun ruling which incorporated the Miller guidelines in O.R.C. 2907.01(F).

In State v. Vixen, (Vixen II), the opinion of the Ohio Supreme Court quoted the Miller "examples" as well as the Miller guidelines. Burgun approved State v. Vixen. Further, the Ohio Supreme

Court demonstrated its acquaintanceship with the Miller "examples" by its reference to p. 25 of Miller containing these examples. Applying the teachings of Ward v. Illinois, it is concluded that by expressly incorporating the Miller guidelines into O.R.C. 2907.01(F) with full knowledge of the Miller "examples," the Ohio Supreme Court has impliedly incorporated the Miller "examples" as well.

In Sovereign News Co. v. Falke, supra, Judge Manos declared O.R.C. 2907.01 and 2907.32 "unconstitutionally overbraod on their face;" he further declared O.R.C. 2907.01(F) "unconstitutionally vague." Thereafter, the court of appeals remanded the consolidated cases "to the district court for further consideration in the light of the decision of the Supreme Court of Ohio in State of Ohio v.

Burgun." Sovereign News Company v. Corrigan, 610 F.2d 428 (6th Cir. 1978). Without reference to what Judge Manos may decide on such remand, this court has the independent responsibility to decide the instant habeas corpus petition in light of the applicable and controlling law including Burgun, Miller, and Ward v. Illinois.

Judge Manos concluded that "[o]n the question of whether an Ohio court can put an authoritative gloss on §2907.01 thereby making it constitutional, the court finds that this cannot be done 'readily'." 448 F.Supp. at 404. He further concluded:

> Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it.
>
> ****
>
> To restructure Ohio Revised Code §2907.01 into a conjunctive

> statute in order to satisfy the Miller test, when it is a disjunctive statute on its face, would require strained reasoning by an Ohio Court.

Id., at 405. The incorporation of the Miller guidelines into O.R.C. 2907.01(F) by Burgun requires that the three parts of the guidelines be conjunctive, as in Miller, and that these three parts be proved in addition to one or more of the five sections of O.R.C. §2901.07(F). But in thus limiting Ohio's obscenity definition in accordance with Miller, it was not additionally necessary for the Ohio Supreme Court to impose a conjunctive construction upon the five subsections of O.R.C. 2907.01(F). While noting that O.R.C. 2907.01(F) should be "closely" read, the supreme court did not hold, and properly so, that it must be read conjunctively. Instead, it held that by the incorporation of the conjunctive

Miller guidelines "the current statutory definition has been effectively narrowed to constitutionally permitted parameters." 56 Ohio St. 2d at 361, 384 N.E.2d at 261.

Aware of the constitutional "parameters" of Miller, the Ohio Supreme Court has imposed the Miller limitations upon the Ohio statute, thus meeting the petitioner's assertions that O.R.C. 2907.01(F) is overbroad and vague. The implied incorporation of the Miller "examples" satisfies the constitutional requirements of specificity and notice. Thus authoritatively construed, O.R.C. 2907.01(F) is constitutional.

II.

Without designating the Ohio pandering obscenity statute (O.R.C. §2907.32(A)(2)) by section number, an omission which is presently unimportant, Judge Salvatore Calandra, in his jury instructions, told

the jury that the defendant was charged with the following "portion of the pandering obscenity statute:"

> I will read to you the statute that we were talking about and that we read when we first began the trial to refresh your memory. The defendant is charged with violation of the statute of pandering obscenity which reads as follows: - or that portion [with] which he is charged: "no person with knowledge of the character of the material or persons involved shall do any of the following: exhibit or advertise for sale or dissemination or sell or publicly disseminate or display any obscene material.

The court then stated:

> The elements of the crime, the essential elements of the crime, [are] knowledge of the character or the material, exhibit for sale, obscene material. I will read you the statute on the definition of obscenity in the State of Ohio. [The Judge then read the statute which is quoted, supra, at p.9.]

Continuing:

> These are the elements of the crime - knowledge of the content and character, exhibit for sale,

obscene material. You have a definition of obscene material. In addition, the Supreme Court of the United States has given basic guidelines to those who are the triers of the fact. In this case, you are the triers of the facts so in addition to the statutes which I have read to you, for you to find that the material which is in evidence, the magazine purchased, for you to find that material to be obscene, you must apply these guidelines; the definition of obscene which is stated in that statute; whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; whether the works depict or describe in an offensive way sexual conduct specifically defined by the applicable state law; and whether the work taken as a whole lacks the serious literary, artistic, or scientific value. I won't repeat it, but I will just emphasize that I use the work "and" and not "or." All these must be present beyond a reasonable doubt before you can find that the material presented to you is legally obscene.[5]

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[5] Thus he told the jury that it must find that the magazine was obscene according to the statutory definition of obscenity but also that the

After Judge Calandra instructed the jury on other elements of the crime, he further charged the jury with reference to the definition of obscenity as follows:

> Further, the Supreme Court has stated that for you to determine that the magazine is legally obscene, you must see whether or not as a whole it appeals to the prurient interest. You must determine whether this feeling appeals to a prurient interest, for if it does not, it cannot be obscene. Prurient is p-r-u-r-i-e-n-t, because sometimes I don't pronounce it correctly. Now, let me see if I can define it for you. A magazine or a periodical does not appeal to a prurient interest just because it deals with sex. Prurient interest is an unhealthy, unwholesome

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5 cont.
three elements of the Miller guidelines - which he read - "all these must be present beyond a reasonable doubt before you can find that the material presented to you is legally obscene." Thus, while the jury need only have found present one or more of the five sections of O.R.C. 2907.01(F), the jury was required to find all three elements of the guidelines were present.

morbid, degrading and shameful interest in sex. An interest in sex is normal, but if the material appeals to an abnormal interest in sex, it can appeal to a prurient interest in your determination and one of the elements you must find. Also the Supreme Court has indicated that one of the guidelines is whether or not the material is patently offensive. In order to be legally obscene, the film must depict sexual conduct or - excuse me - the periodical must depict sexual conduct specifically defined by the state laws and depict in a patently offensive way. That's in a way that offends the contemporary community standards we have described above. You must find that the description of the sexual activity shown in the magazine goes substantially beyond customary limits and candor to determine whether or not it's patently offensive. The guidelines of the Supreme Court requires you to determine whether the magazine taken in its entirety, taken as a whole, lacks any serious literary, artistic, political or scientific value. I believe those words are sort of self-sufficient on themselves; and need no further clarification.

In the foregoing obscenity instructions, constituting all the court's instructions

on this subject, it is evident that the court did not read or refer to the Miller "examples."

In his recommended report, the magistrate noted that the court (Judge Calandra) did not define sexual conduct in terms of the two examples in Miller at p. 25, nor did the court define sexual conduct as it appears in Ohio Revised Code §2907.01(A). The magistrate then concluded:

> Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. Sovereign News Co., supra, at p. 400.

Thereupon he recommended that the petition for a writ of habeas corpus be granted.

Immediately before Judge Calandra gave his general instructions to the jury, he informed defense counsel that he would

"charge the jury on the Miller case and the Smith case and the Burgun (sic) case." As the quoted portions of Judge Calandra's instructions indicated, he gave the jury the Miller guidelines. Following the completion of the general instructions, there was a discussion at the bench about several matters. At that time, defense counsel did not ask the judge to add the Miller "examples" to the court's instructions on the Miller guidelines. Thus defendant did not ask the court to give to the jury the Miller "examples." Moreover, defendant did not object to the giving of the Miller guidelines without the Miller "examples."

In Henderson v. Kibbe, 431 U.S. 145, 154-55, (1977), the Court reversed a decision of the Second Circuit wherein a divided panel had granted a state prisoner's petition for habeas corpus

on the ground that a New York state trial judge's failure to instruct the jury on the issue of causation was constitutional error. The Court observed:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The Court further noted that "an omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." The Court announced the rule that is controlling here:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error

> on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S. at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

Id., at 146.

This controlling rule of federal habeas corpus law differs from the magistrate's recommended ruling, isolating, as he did, the judge's instructions from the rest of the trial and determining that the court's instructions were unconstitutionally incomplete. However, the question in this federal habeas corpus proceeding is not whether Judge Calandra's instruction to the jury, sans a definition of "sexual conduct" in terms of the two examples in Miller, at p. 25, nor "... as it appears in O.R.C. 2907.01(A)," rendered the "instructions...unconstitutionally overbroad." The question rather

is whether the instructions without such definition of sexual conduct "so infected the entire trial that the resulting conviction violates due process."

Turoso's pandering obscenity conviction rests primarily on his sale of the magazines "Sexual Fantasies Part I and Part II." In its cover pages, the magazine is described as "scientific, educational and sociological" and "dedicated to sexual knowledge of the mature adult." The text portion of the 63 pages of both Part I and Part II is typified by this excerpt:

> Again, let us clarify - everyone has, at one time or another, "bizarre" or exotic, even quite weird, sexual fantasies. One is tempted to think that such are abnormal, but quite the opposite is true. The total absence of such from one's conscious fantasy rather indicates excessive repression and is a sign therefore of emotional or mental disorder as opposed to sound health.

> But the fact that no such conscious fantasy occurs does not mean the mind is free of bizarre imaginings concerning sex. It merely indicates that such occur completely below the level of consciousness.

It is unnecessary to further appraise the text portions of the magazines. The jury was correctly instructed by the trial judge, in accordance with the first Miller guideline, to determine whether "the average person applying community standards would find that the magazine, taken as a whole, appeals to the prurient interest." But the trier of the facts, in carrying out this instruction, is met with the obvious structuring of the magazines. The text makes no reference to, and makes no attempt to, incorporate into the text the photographic depictions of explicit sexual conduct and activity which appear on each of the pages in both Part I and Part II.

Undoubtedly, it is these photographic depictions (88 in Part I and 104 in Part II) which are "dedicated to sexual knowledge of the mature adult." However, examination demonstrates that despite this purported purpose, these depictions are "sex...exploited without limit by... pictures exhibited or sold in places of public accomodation." Miller, at p. 25. The depictions display two or three persons of different sexes, or of the same sex, engaged in various sexual acts. In addition to so-called normal sexual copulation between male and female, there is masturbation, cunnilingus, fellatio, and anal intercourse, with the participants in twos or threes.

It is conclusively evident and it is determined that the photographic depictions of these sexual acts qualify as "plain examples of what a state statute

could define for regulation under part (b) of the standard announced in this opinion," Miller, supra, at 25. Each of the 192 photographic depictions of explicit sex both fall within either (a) or (b) or the Miller "examples":

> (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Also, the 192 depictions display "sexual conduct" as thus defined in section 2907.01(A):

> "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

The finding of guilty warrants the presumption that the jury found that each

of the three Miller guidelines was established by the evidence beyond a reasonable doubt. The evidence, highlighted here, fully supports those findings. It is not conceivable, nor does the record support the proposition, that the jury might have acquitted the defendant had Judge Calandra included the Miller "examples" in his instructions to the jury. Certainly the magistrate's opinion does not suggest that this might have been the verdict had the Miller "examples" been included in the judge's instructions to the jury.

Applying the Henderson v. Kibbe test, it is concluded and determined that the omission of the Miller "examples" from the judge's instructions to the jury in no manner "infected" the entire trial or produced the conviction. Therefore, the instructions, as given, did not violate

due process.

The habeas corpus petition of Frank Turoso is denied.

IT IS SO ORDERED.

/s/William K. Thomas
U.S. DISTRICT JUDGE

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FRANK TUROSO	)	
	)	
Petitioner	)	Civil Action
	)	
vs	)	Number C79-1010
	)	
THE CLEVELAND MUNICIPAL COURT, et al.	)	O R D E R [Entered Sept. 24, 1980]
	)	
Respondents	)	

The Court having filed its Memorandum and Order denying Petitioner's petition for a Writ of Habeas Corpus, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the petition for a Writ of Habeas Corpus is hereby denied.

/s/William K. Thomas
WILLIAM S. THOMAS,
U.S.D.C. Judge

CERTIFICATE OF PROBABLE CAUSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FRANK TUROSO	)	
	)	
Petitioner	)	Civil Action
	)	
vs	)	Number C79-1010
	)	
THE CLEVELAND	)	
MUNICIPAL COURT,	)	O R D E R
et al.	)	[Entered Oct. 7,
	)	1980]
Respondents	)	

Upon consideration of the application of petitioner for a Certificate of Probable Cause for Appeal,

IT IS ORDERED that the application of petitioner for a Certificate of Probable Cause is hereby granted and the court certifies that the appeal is not frivolous.

/s/ William S. Thomas
WILLIAM S. THOMAS,
U.S.D.C. Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-1010
	)	
Petitioner	)	JUDGE WILLIAM K. THOMAS
	)	
-v-	)	
	)	
THE CLEVELAND MUNICIPAL COURT, et al.,	)	REPORT AND RECOMMENDED DECISION OF MAGISTRATE
	)	
Respondent	)	[Entered Mar. 26, 1980]

STREEPY, MAG.

In January of 1977 the petitioner, Mr. Frank Turoso, was charged by way of complaint with the unlawful sale of an obscene magazine in violation of Ohio Rev. Code §2907.32(A)(2). On February 12, 1977, he was informed in a bill of particulars that the magazine he was charged with selling was obscene pursuant to Ohio Rev. Code §2907.01(F) when read in pari materia with the guidelines of Miller v. California, 413 U.S. 15, at

pp. 24-25 (1973), hereafter referred to as Miller. In April of 1977 he was tried before a jury and found guilty of unlawfully selling the obscene magazine "Sex Fantasies", Vol. I, No. 1. He was subsequently sentenced to imprisonment of six months and a fine of $1,000.

I

Petitioner appealed to the appropriate Ohio Court of Appeals. Subsequent to his conviction, but prior to the Ohio Court of Appeals decision thereon, the Ohio Supreme Court decided State v. Burgun, 56 Ohio St.2d 354 (1978), hereafter referred to as Burgun, which ruled the Ohio definition of obscenity was constitutional, when read in pari materia with the three part guidelines in Miller. The Ohio Court of Appeals affirmed petitioner's conviction on April 26, 1979, citing Burgun in part. Petitioner did not seek

an appeal to the Ohio Supreme Court. He contends he did not have to appeal to the Ohio Supreme Court as a prerequisite to filing his petition since such an appeal would have been an exercise in futility by reason of Burgun.

The substantive issue raised in this petition is whether the definition of obscenity under Ohio law on which petitioner was convicted was constitutional. In Miller the United States Supreme Court indicated that state statutes designed to regulate obscene materials must be carefully limited. As a result Miller imposed the following three part standard of obscenity (p.24):

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by

> the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller confined the permissible scope of state obscenity regulation to works which depict or describe, in a patently offensive way, sexual conduct as specifically defined by the applicable state law. Miller further held that only the depiction or description of "hardcore" sexual conduct may be punished as being obscene, Id. at p. 27; Sovereign New Co. v. Falke, 448 F.Supp. 306, 394-395 (N.D. Ohio 1977, Manos, J), remanded on other grounds, 610 F.2d 428 (6th Cir. 1979); 227 Book Center, Inc. v. Codd, 381 F.Supp. 1111 (S.D.N.Y. 1974). The Court emphasized that it was not proposing a regulatory scheme for the states, but did give two examples of the type of sexual conduct considered to be "hardcore" under part (b) of the Miller standard

(p.25):

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

A

There is language in Burgun that arguably could be interpreted to hold the instructions in petitioner's case failed to correctly instruct as to the Ohio law of obscenity, thus an appeal to the Ohio Supreme Court would result in a reversal of petitioner's conviction.

This interpretation stems in part from Ward v. Illinois, 431 U.S. 767 (1977), wherein the Supreme Court considered the constitutionality of Illinois obscenity law. One of the issues raised was whether Illinois law was unconstitutionally overbroad since it did not describe the kinds of sexual conduct which could be

considered by a jury pursuant to part (b) of the Miller guidelines. The Supreme Court rejected this contention noting in part (p.775):

> As we understand the Illinois Supreme Court, however, the statute is not vulnerable in this respect. That court expressly incorporated into the statute part (b) of the guidelines, which requires inquiry 'whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.' 413 U.S. at 24. The Illinois court must have been aware of the need for specificity and of the Miller Court's examples explaining the reach of part (b). See id., at 25. The Illinois court plainly intended to conform the Illinois law to part (b) of Miller, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the Miller examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative

> reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirements set down in Miller.

It is possible to make the same observations with reference to the Ohio Supreme Court Burgun decision.

The United States Supreme Court continued in Ward, supra (p.775):

> Furthermore, in a later case, People v. Gould, 60 Ill. 2d 159, 324 N.E.2d 412 (1975), the Illinois Supreme Court quoted at length from Miller v. California, including the entire passage set out at the beginning of this opinion, supra, at 768-770, a passage that contains the explanatory examples as well as the guidelines.... Because the quotation contained not only part (b) but the examples given to explain that part, it would be a needlessly and technical and wholly unwarranted reading of the Illinois opinions to conclude that the state court did not adopt these explanatory examples as well as the guidelines themselves.

Similar observations can be made with reference to Ohio law. In State v. Vixen, 35 Ohio St.2d 215 (1973), the Ohio Supreme Court not only quoted the three part Miller guidelines but also quoted the explanatory examples in Miller. Burgun noted that Vixen, supra, held the Ohio statutory definitions comport with the standards enunciated in Miller.

Finally, Burgun further stated (p.361):

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative' state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited.

A close reading of R.C. 2907.01, as mandated by Burgun, includes the definition of sexual conduct in Ohio Rev. Code

§2907.01()A which reads as follows:

> (A) 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

It is arguable that this definition of sexual conduct, considered in combination with the element of "patently offensive" in part (b) of the Miller guidelines, comes within the examples of "hardcore" sexual conduct set forth in Miller, at p. 25, which the state may constitutionally regulate.

B

The jury instructions in petitioner's case did not define sexual conduct. As noted earlier, if the above interpretation of Ohio obscenity law is accurate it could be argued that an appeal of petitioner's conviction to the Ohio

Supreme Court would result in a reversal. However, other facts surrounding Burgun show that such an appeal would not result in a reversal.

Burgun considered the appeals of four separate convictions in Cleveland Municipal Court under Ohio obscenity law. It reversed the conviction in one appeal (State v. Burgun) since the trial court failed to instruct pursuant to Miller. As to the other three appeals, Burgun ruled that in each instance the jury was correctly instructed pursuant to the test of obscenity laid down in Miller, thus affirmed those convictions. The court instructions as to obscenity in two of those three convictions (State v. Krute and State v. Turoso) were substantially the same as the definition of obscenity set forth in the court instructions at petitioner's trial, that is, no

definition of sexual conduct under Ohio law was given to the jury (in the third conviction, State v. Bayless, the trial court defined sexual conduct pursuant to Ohio Rev. Code §2907.01(A)). Burgun has been cited and followed by the Ohio Supreme Court in State v. Thomas, 57 Ohio St.2d 71 (1979). It is evident that in the event petitioner had appealed, or would appeal, his conviction to the Ohio Supreme Court it would be affirmed.

The exhaustion of state remedies is not absolute. To require the petitioner in the present case to exhaust his appeal to the Ohio Supreme Court would be an exercise in futility. It appears more than probable that the Supreme Court of Ohio would adhere to its previous decisions in Burgun and Thomas, and affirm petitioner's conviction. Under these circumstances the petitioner was not required to appeal his conviction to the

Ohio Supreme Court. See Lucas v. People of State of Michigan, 420 F.2d 259 (6th Cir. 1970); Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971); Stubbs v. Smith, 533 F.2d 64 (2nd Cir. 1976); Layton v. Carson, 479 F.2d 1275 (5th Cir. 1973).

The fact petitioner has been released on state bond ever since his sentencing fails to establish he is not in custody within the meaning of 28 U.S.C. §2254, see Hensley v. Municipal Court, 411 U.S. 345 (1973); Lefkowitz v. Newsome, 420 U.S. 283 (1975).

This court has jurisdiction to determine the constitutional issue raised in the petition.

II

The issue herein is whether the court instructions to the jury unconstitutionally defined obscenity. Jury instructions

are to be judged as a whole. Cupp v. Naughten, 414 U.S. 141 (1973); United States v. Marttucci, 502 F.2d 883 (6th Cir. 1974). However, instructions must not be such as to mislead the jury; they should be consistent and harmonious. Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956).

In defining obscenity the trial court initially informed the jury that, "I will read to you the statute on the definition of obscenity in the State of Ohio." (T 57) Immediately thereafter the court read Ohio Rev. Code §2907.01 (F)(1)(2)(3)(4) and (5) (but without identifying it by section number of letter) to the jury (T 57-58):

> (F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or

performance is 'obscene' if any of the following apply:
(1) Its dominant appeal is to prurient interest;
(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;
(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;
(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an

interest is primarily for its own sake or for commerical exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

The court did not conclude its instructions on the definition of obscenity upon reading Ohio Rev. Code §2907.01(F), continuing as follows (58-59):

> You have a definition of obscene material. In addition the Supreme Court of the United States has given basic guidelines to those who are the trier of the facts. In this case you are the triers of the facts so in addition to the statutes which I have read to you [an apparent reference to Ohio Rev. Code §2907.01(F)(1)(2)(3)(4) and (5)], for you to find that the material which is in evidence, the magazine purchased, for you to find that material to be obscene, you must apply these guidelines: the definition of obscene which is stated in that statute [an apparent reference to Ohio Rev. Code §2907.01(F)(1)(2)(3)(4) and (5)]; whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; whether the works depict or describe in an offensive way sexual conduct

specifically defined by the applicable state law; and whether the work taken as a whole lacks the serious literary, artistic, or scientific value. I won't repeat it, but I will just emphasize that I used the word 'and' and not 'or.' All these must be present beyond a reasonable doubt before you can find that the material presented to you is legally obscene.

Followign some instructions on other elements of the crime the court returned to the definition of obscenity. (T61-64), stating in part (T63-64):

Further, the Supreme Court has stated that for you to determine the magazine [an apparent reference to the magazine at issue in petitioner's trial] is legally obscene you must see whether or not as a whole it appeals to the prurient interest. You must determine whether this feeling appeals to a prurient interest, for if it does not, it cannot be obscene. Prurient is p-r-u-r-i-e-n-t, because sometimes I don't pronounce it correctly. Now, let me see if I can define it for you. A magazine or periodical does not appeal to a prurient interest just because it deals with sex. Prurient is an unhealthy,

unwholesome, morbid, degrading and shameful interest in sex. An interest in sex is normal, but if the material appeals to an abnormal interest in sex it can appeal to a prurient interest in your determination and one of the elements you must find. Also the Supreme Court has indicated that one of guidelines is whether or not the material is patently offensive. In order to be legally obscene, the film must depict sexual conduct or -- excuse me-- the periodical must depict sexual conduct specifically defined by the state laws and depict in a patently offensive way. That's in a way that offends the contemporary community standards we have described above. You must find that the description of the sexual activities shown in that magazine goes substantially beyond customary limits and candor to determine whether or not it's patently offensive. The guidelines of the Supreme Court requires you to determine whether the magazine taken in its entirety, taken as a whole, lacks any serious literary, artistic, political, or scientific value. I believe those words are sort of self-sufficient on themselves; they need no further clarification.

These comments concluded the court instructions to the jury on the element

of obscenity.

The court in petitioner's case did instruct the jury in the language of the three part Miller standard; but did not specifically define "sexual conduct" in part (b) of the standard pursuant to the applicable state law. Thus the court did not define sexual conduct in terms of the two examples in Miller, at p.25, nor did the court define sexual conduct as it appears in Ohio Rev. Code §2907.01 (A). Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity the instructions were unconstitutionally overbroad. Sovereign News Co., supra at p.400.

RECOMMENDATION

It is recommended that the peition for a writ of habeas corpus be granted.

Dated: March 26, 1980

/s/Jack B. Streepy
Jack B. Streepy
United States Magistrate

OPINION OF THE COURT OF APPEALS

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 37897

STATE OF OHIO,
CITY OF CLEVELAND

APPELLEE

-vs-

FRANK TUROSO

APPELLANT

APPEAL FROM

CLEVELAND MUNICIPAL COURT

NO. 77 CRB 1472

JOURNAL ENTRY
AND
OPINION

DATE April 26, 1979

PATTON, J.:

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and herefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Defendant was convicted by a jury of pandering obscenity in violation of R.C. 2907.32(A)(2) on April 29, 1977.

A Cleveland police officer testified that on January 17, 1977 he entered a bookstore located at 9405 Lorain Avenue. Defendant was walking around the store, sorting and placing magazines in racks, and speaking with a man behind the counter. The officer described the lay-out of the store and the location therein of various goods and reading materials. The officer purchased a magazine (State's Exhibit 1).

A second officer testified that he accompanied the first officer to the store referred to above. He also testified that he had previously been in the same store, that it had sold sexually oriented materials for some time and that he had observed defendant in the

store on one prior occasion.

The trial court instructed the jury with respect to the definition of obscenity both under the Ohio statute (R.C. 2907.01(F)), and under the criteria set forth by the U.S. Supreme Court in Miller v. California (1973), 413 U.S. 15.

Defendant was found guilty as set forth above, and was sentenced to six months in jail and a $1,000.00 fine. Defendant appeals submitting the following as error:

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SUPPRESS THE MAGAZINE AT ISSUE BECAUSE THE PURCHASE OF THIS MAGAZINE BY A PLAINCLOTHES POLICE OFFICER VIOLATED DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

II. THE STATUTE PURSUANT TO WHICH DEFENDANT WAS CHARGED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

A. OHIO REVISED CODE §2907.01(F) IS UNCONSITUTIONALLY OVERBROAD.

B. OHIO REVISED CODE §2907.01(F) IS UNCONSTITUTIONALLY VAGUE.

III. & IV. THE COMPLAINT AND THE CHARGE TO THE JURY WERE DEFECTIVE IN THAT THE MATERIAL ELEMENT THAT DEFENDANT HAVE KNOWLEDGE OF THE CONTENT OF THE MAGAZINE WAS NOT ALLEGED IN THE COMPLAINT AND THE JURY WAS NOT INSTRUCTED ON THE NECESSITY OF SUCH KNOWLEDGE.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME.

VI. REVISED CODE SECTION 2907.32 IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

VII. THE MAGAZINE IN ISSUE IS NOT LEGALLY OBSCENE.

ASSIGNMENT OF ERROR 1

It is well settled that the Fourth Amendment protects privacy. Katz v. United States (1967), 389 U.S. 347. In the present case, the premises upon which the alleged criminal activity took place were commercial premises and open to the public. There was no expec-

tation of privacy here. The police officer entered the store and bought a magazine as any member of the general public might do (and, in fact, was invited to do). There having been no "seizure" but rather a commercial transaction in a business setting where there was no expectation ofprivacy, the officre's purchase was not an unlawful search and seizure under the Fourth Amendment of the United States Constitution.

Furthermore, this court has distinguished a "purchase" of obscene magazines from a true search and seizure. See Hollington v. Ricco (1973), 40 Ohio App. 2d 57 at 72. This distinction is based on the fact that "[a] search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed; and that a

seizure connotes a forcible dispossession of the owner." (Emphasis supplied.) State v. Minneker (1971), 27 Ohio St.2d 155.

There having been no search and seizure as contemplated by the U.S. Constitution, the first assignment of error is not well taken.

ASSIGNMENT OF ERROR II

The appellant's next contention is that the definition of obscenity contained in R.C. 2907.01(F) is unconstitutionally overbroad and vague. This court has previously considered this issue, and it has held that the statutory definition of obscenity is constitutional when properly narrowed by the trial court to comport with the standards laid down in Miller v. California, supra. See State v. Dalene Burgun (1976), 49 Ohio App. 2d 112

(Burgun I). This position has been upheld by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354 at 361. Since the trial court instructed the jury on the Miller requirements, we overrule this assignment.

ASSIGNMENTS OF ERROR III, IV, AND V

In these assignments, the appellant argues (1) that the complaint did not allege that the defendant knew the contents of the magazine, (2) that the court did not instruct the jury that an element of the crime was knowledge of the contents, and (3) the state did not prove that the defendant knew the contents of the magazine. In Burgun I, this court held it was sufficient if the state alleged and proved that the defendant knew of the character of the

material. See id. at 120. Since the complaint alleged that the defendant knew the character of the magazine, the court instructed the jury in that regard, and the state proved that element, we find this assignment to be without merit. This position was also upheld by the Supreme Court in State v. Burgun, supra at 366.

ASSIGNMENT OF ERROR VI

This court has also considered in a previous case the appellant's argument that R.C. 2907.32 is violative of the Equal Protection Clause. In Burgun I, this court stated that provision (C) of R.C. 2907.35 violated the Equal Protection Clause because it exempted projectionists from prosecution. However, this court also stated that while provision (C) was invalid, the remainder

of the statute was valid. Later, in State v. Bayless (Ct. App. Cuy. Cty. July 21, 1977), No. 36264, this court held that the statute did not violate the constitutional rights of one who was not a projectionist. The defendant in this case was not a projectionist; and for the reasons stated in Bayless, we find that his right to equal protection under the law was not violated. Furthermore, the Supreme Corut held in State v. Burgun, supra, that a person who had not shown that he/she was similarly situated with the projectionists had no standing to raise this equal protection argument. Id. at 365. Appellant has not shown that his position is similar to that of a projectionist; thus he is not within the class of persons prejudiced by the exemption and has no standing to claim that he has been denied equal protection under the law.

ASSIGNMENT OF ERROR VII

Appellant's final assignment is that the magazine in issue is not legally obscene. After reviewing the contents of the magazine in light of the standards laid down in Miller, we find that the magazine is obscene as a matter of law.

For the reasons stated herein we affirm the judgment of the trial court.

Received for Filing

April 26, 1979

Gerald E. Fuerst
By/s/Peggy Moguel

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

JOURNALIZED May 7, 1979
Gerald E. Fuerst,
Clerk of Courts
By/s/Peggy Moguel
Deputy

PARRINO, P.J.,

KRUPANSKY, J., CONCUR

/s/ John T. Patton
Judge
JOHN T. PATTON

Appearances:

For Plaintiff-Appellee: Almeta A. Johnson
For Defendant-Appellant: Bernard A. Berkman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAURA SPIKER,	)	CASE NO. C79-704
	)	
Petitioner,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE CLEVELAND MUNICIPAL COURT and THE HONORABLE SALVATORE CALANDRA and THE ATTORNEY GENERAL OF THE STATE OF OHIO, WILLIAM J. BROWN	)	O R D E R [Entered Oct. 6, 1980]
	)	
Respondents.	)	

The petitioner, Laura Spiker, filed her petition in this court for a writ of habeas corpus challenging her conviction and sentence for pandering obscenity, under O.R.C. §2907.32. That conviction was entered on April 25, 1977 by the Cleveland Municipal Court, Cuyahoga County, and was affirmed by the Eighth District Court of Appeals in a decision announced March 8, 1979. No appeal was

taken to the Ohio Supreme Court.

To entertain a petition for a writ of habeas corpus, the District Court must determine, first, that the petitioner is in custody, 28 U.S.C. §§2241(c)(1), and 2254(a); and second, that she has exhausted all her available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 882 (1963); Wilwording v. Swenson, 404 U.S. 429, 92 S.Ct. 409 (1971).

In Hensley v. Municipal Court, 411 U.S. 343, 93 S.Ct. 1571 (1973) the court held that one released on personal recognizance pending execution of a sentence is in custody for purposes of habeas corpus relief.

With regard to the requirement that the petitioner exhaust her state remedies, the Sixth Circuit in Lucas v. People State of Michigan, 420 F.2d 259 (6th

Cir. 1970), held that if the state appeals courts have ruled contrary to the claims of constitutional violations raised by the habeas corpus petition, and it appears probable that they will adhere to their previous rulings, futile appeals will not be required. The exhaustion of state remedies does not necessitate appeals which are clearly futile. See Coleman v. Maxwell, 351 F.2d 285 (6th Cir.); Keener v. Ridenour, 594 F.2d 581 (6th Cir. 1979); Collins v. Perini, 448 F.Supp. 1006 (N.D. Ohio 1978).

In contradistinction to the decision of this court in Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio, 1977), the Supreme Court of Ohio found the Ohio obscenity statute, Ohio Revised Code §2907.32, to be constitutionally unassailable. State v. Burgun, 56 Ohio St.

354, 384 N.E.2d 255 (1978). Moreover, the court affirmed its Burgun holding in a per curium opinion handed down one year later. State v. Thomas, 57 Ohio St. 2d 71, 387 N.E.2d 229 (1979). This court is persuaded that the Supreme Court of Ohio will not reverse its position regarding the constitutionality of Ohio Revised Code §2907.32. There being no requirement that the petitioner engage in a "judicial runaround," Lucas, supra at 262, the court finds that the petitioner is in custody and that she has exhausted all available state remedies.

Deciding that both jurisdictional prerequisites have been met, the court next considers the merits of the petitioner's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims the statute is constitutionally infirm in violation

of his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbroad and does not meet the test of constitutionality announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News. v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978) , and State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). Notwithstanding this court's holding in Sovereign News declaring the statute unconstitutional, the Ohio State

Supreme Court in Burgun attempted to rewrite by judicial gloss and intricate statutory interpretation the statute enacted by the legislature.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated through judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977).

The petition for a writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAURA SPIKER,	)	CASE NO. C79-704
	)	
Petitioner,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE CLEVELAND MUNICIPAL COURT and THE HONORABLE SALVATORE CALANDRA and THE ATTORNEY GENERAL OF THE STATE OF OHIO, WILLIAM J. BROWN	)	FINAL JUDGMENT ORDER [Entered Oct. 6, 1980]
	)	
Respondents.	)	

Pursuant to the memorandum attached to this Order, the petition for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 37978

STATE OF OHIO,
CITY OF CLEVELAND

APPELLEE

-vs-

LAURA SPIKER

APPELLANT

APPEAL FROM

Cleveland Municipal
COURT
No. 76 CRB 28625

JOURNAL ENTRY
AND
OPINION

DATE March 8, 1979

KRENZLER, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On November 11, 1976, police officer John McNamara of the Cleveland Police Department's Special Investigative Unit entered an adult bookstore at 693 East 185th Street in Cleveland. After looking at several magazines in the front section of the store, he proceeded to one of twelve booths in the rear of the store, entered the booth, and watched a film activated by a coin operated projector. He then left the store and returned to his office where he typed up an affidavit describing the film. On the following day he again entered the store with a search warrant which had been issued that morning. The defendant-appellant, Laura Spiker, was the only other individual in the store, and was standing behind the cashier's counter. Officer McNamara then viewed the same film he had seen on the previous day and left the premises for about an hour. Upon return-

ing to the store, the officer arrested the appellant and seized the film and projector. The appellant was charged with pandering obscenity in violation of R.C. 2907.32(A)(4).

At her arraignment on November 15, 1976, the appellant plead not guilty to the charge. Following a jury trial in the Cleveland Municipal Court the appellant was found guilty as charged, and was sentenced to sixty days imprisonment and a fine of $1,000.00. Execution of the sentence was stayed by the trial judge pending this appeal.

The appellant filed a timely notice of appeal, and presents the following assignments of error:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS THE FILM AND PROJECTOR BECAUSE THE SEIZURE OF THESE ITEMS VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS.

II. THE STATUTE PURSUANT TO WHICH DEFENDANT WAS CHARGED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT HER RIGHT TO EXAMINE PROSPECTIVE JURORS REGARDING THEIR POSSIBLE BIAS OR PREJUDICE.

IV. & V. THE COMPLAINT AND THE CHARGE TO THE JURY WERE DEFECTIVE IN THAT THE MATERIAL ELEMENT THAT DEFENDANT HAVE KNOWLEDGE OF THE CONTENT OF THE MAGAZINE WAS NOT ALLEGED IN THE COMPLAINT AND THE JURY WAS NOT INSTRUCTED ON THE NECESSITY OF SUCH KNOWLEDGE.

VI. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME.

VII. REVISED CODE SECTION 2907.32 IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

VIII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS A MATTER OF LAW THAT THE USE OF 25 CENTS TO ACTIVATE THE PROJECTOR WAS AN ADMISSION CHARGE BECAUSE THIS WAS A DETERMINATION OF FACT TO BE MADE SOLELY BY THE JURY.

IX. THE FILM IN ISSUE IS NOT LEGALLY OBSCENE.

In her first assignment of error, the appellant contends that the trial court

erred in overruling her motion to suppress the film and projector, thereby depriving her of her constitutional rights. This assignment of error consists of two contentions: first, that the affidavit submitted in support of the warrant was insufficient to establish probable cause; and second, that the warrant was defective since prior to its issuance the judge did not personally view the film.

We are unable to address the appellant's argument concerning the sufficiency of the affidavit since that document has not been made a part of the record before this court on appeal. See State v. Dalene Burgun (1976), 49 Ohio App. 2d 112, 122.

As for the sufficiency of the warrant, the Ohio Supreme Court has ruled that, "In order to issue a valid warrant the appropriate judicial officer must be able to 'focus searchingly on the question of

obscenity.' Roaden v. Kentucky (1973), 413 U.S. 496, 506." State v. Ronald Burgun (1978), 56 Ohio St. 2d 354, 362. In State v. R. Burgun, supra, the Supreme Court went on to rule that the judge issuing the warrant had sufficient facts before him in the affidavit to authorize a constitutionally proper warrant. The court also noted that to require in each case that a film be viewed prior to issuance of a search warrant "would place an undue burden on an already overladen criminal justice system." Id. at 362. Accordingly, insofar as appellant contends that the trial judge was required personally to view the film, she is incorrect. Furthermore, since the affidavit submitted to the court is not before us on this appeal, we are unable to find that it was insufficient to allow the court to make a proper determination of probable cause. Appellant's

first assignment of error is overruled.

In her second assignment of error, the appellant contends that the definition of obscenity in R.C. 2907.01(F) is both overbroad and vague in violation of the First and Fourteenth Amendments.

In State v. R. Burgun, supra, the Ohio Supreme Court held that R.C. 2907.01 (F) "is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California (1973), 413 U.S. 15." The three part Miller guidelines are "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest....; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the

applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value..." State v. R. Burgun, supra at 357-358 quoting Miller v. California, supra at 24.

The Ohio statute is neither overly broad nor vague where the jury is instructed initially under the state statute, and then is given a "narrowing" instruction restricting the definition of obscenity in accordance with the Miller guidelines. State v. R. Burgun, supra at 361. Such a narrowing instruction was given in the instant case. Accordingly, the appellant's second assignment of error is without merit and is overruled.

In her third assignment of error, the appellant contends that the trial court abused its discretion by unreasonably restricting the scope of defense counsel's

inquiry during the voir dire examination of prospective jurors. Three separate rulings by the trial court are questioned, each of which will be treated in turn.

First, appellant's counsel attempted to detail to the jurors the explicit nature of the film in issue, and also to present to the jury samples of photographs and other unidentified materials to ascertain their reaction.

The purpose of voir dire examination is both to determine that each juror has statutory qualifications, and also that he is free from bias or prejudice for or against either litigant. Dowd-Feder v. Truesdell (1936), 130 Ohio St. 530. It also "serves as the foundation upon which an 'intelligent exercise of the litigants' right to peremptory challenge may be made." State v. Anderson (1972), 30 OhioSt. 2d 66, 72. Accordingly,

counsel for each side must be given reasonable latitude and opportunity to examine prospective jury members. Id. The determination as to what examination is reasonable "will vary from case to case depending on many factors, including whether the trial to be held is criminal or civil, and, if criminal, for what crime." Id. at 73. The purpose should be "to ascertain rather than to arouse passion or prejudice," Dowd-Feder v. Truesdell, supra at 533, and regulation of the scope of counsel's inquiry is within the court's discretion. State v. Bridgeman (1977), 51 Ohio App. 2d 105.

We conclude that the court's ruling preventing the appellant from showing photographs to the jury, and from detailing the explicit nature of the film in issue was not unreasonable. There was no indication that the photo-

graphs had any relation to the offense in issue involving an allegedly obscene film. This court has previously noted in this regard the trial court's right "to limit the trial to relevant and material matters." State v. Bridgeman, supra at 110. Moreover, we conclude that the proper time for the jury to consider the specific details of the film in issue was during the course of the trial and not during voir dire. Appellant's counsel was certainly entitled to ascertain whether each prospective juror was able to proceed in an unbiased, non-prejudicial manner, but this right does not extend to entitle him to a preliminary determination of how each juror would react to the specific details of the film in issue at trial. Accordingly, the court's first ruling was not unreasonable.

Appellant's counsel also sought to ask the prospective jurors the following

question: "[u]nder our system of law and our constitution, do you believe that an adult in our society has the right to read or see...[w]hat he wants to see?" The court properly noted that this was not a correct statement of the law. See Stanley v. Georgia (1969), 394 U.S. 557. We have previously ruled that counsel may question prospective jurors as to the applicable law, "so long as counsel states the law fairly and accurately, and couches it in language that makes it clear that the court is the final arbiter of the law." State v. Bridgeman, supra at 110. Accordingly, the court's ruling on this matter was not in error.

Finally, the court prevented appellant's counsel from asking members of the jury whether they understood the term "explicit sexual material," in light of the court's earlier statements to the jury that the

film in issue would involve "explicit sex acts" and "scenes of explicit sexual activity." The court had also inquired of the jury whether in considering such material they could return an impartial, unbiased verdict. There is no reason to believe that members of the jury were unable to understand the terms used by the court in its examination. It is noted that with the exception of the objections considered herein, defense counsel had full and ample opportunity to question the prospective jurors without objection. Hence the court's denial of counsel's request to delve further in this area was not an unreasonable exercise of discretion. Accordingly, the appellant's third assignment of error is overruled.

In her fourth and fifth assignments of error the appellant contends that both

the complaint and the court's charge to the jury were defective. This contention rests upon the assertion that knoweldge of the content of the material involved is a constitutional prerequisite for conviction under R.C. 2907.32(A)(4), rather than mere knowledge of the character of the material. The Ohio Supreme Court has ruled to the contrary that knowledge of the character of the material is sufficient to sustain a conviction. State v. R. Burgun, supra at 364. Accordingly, these two assignments of error are without merit and are overruled.

In her sixth assignment of error the appellant argues that the circumstantial evidence relied upon by the prosecution was insufficient to prove knowledge of either the content or the character of the film in issue. Upon consideration

of the evidence adduced at trial that the appellant was an employee in charge of the bookstore, that she had worked in the store over an extended period of time, and that she was in charge of dispensing change to customers for the viewing of the film in issue, we conclude that the jury had sufficient evidence to infer beyond a reasonable doubt that appellant had knowledge of the character of the film. See State v. R. Burgun, supra at 364-65. This assignment of error is overruled.

In her seventh assignment of error, the appellant argues that our invalidation of the qualified projectionist exemption contained in R.C. 2907.35(C), see State v. D. Burgun, supra, necessarily invalidates as well the basic obscenity statute, R.C. 2907.32. Although this court has held the qualified projectionist

exemption to be unconstitutional, we have upheld R.C. 2907.32 as being valid and of full force and effect. State v. D. Burgun, supra. Appellant's seventh assignment of error is not well taken and is overruled.

In her eighth assignment of error the appellant contends that the trial court invaded the province of the jury regarding its determination of whether an admission was charged to view the allegedly obscene film in issue. See R.C. 2907.32 (A)(4). The court's entire charge on this issue was as follows:

> Finally, the essential element, the pandering obscenity, is that the presentation is presented publicly or when admission is charged. You have heard the evidence and the facts are before you to make a determination as to that element.
>
> Also, I will instruct you that -- it is your determination -- the Court will advise you that the necessity of the use of 25

> cents to activate the projection is a charge for it, and is an admission for it. And, if you find that the requirements and the evidence so shows that there was an admission charge for this film, the Court advises you that the requirement of a coin to activate it would be an admission under the definition of requirement of the statute. (Tr. 346-47).

It should be noted, contrary to the appellant's assertion that the trial court did not instruct the jury that an admission was in fact charged. Rather, the court advised the jury regarding how such a finding might be reached. Moreover, in order to assign as error any improper charge to the jury, objection to the charge must be made prior to the time that the jury retires. Crim. R. 30. Since appellant did not object at any point to this portion of the court's charge, any error therein was waived. This assignment of error is overruled.

Appellant's final assignment of error is that the film in question is not legally obscene. In determining whether or not such material is obscene, the court must apply the three criteria set forth in Miller v. California, supra, in conjunction with the definition of obscenity set forth in R.C. 2907.01(F). After viewing the film in issue we conclude that the film's sole appeal is to the prurient interest, that it is a patently offensive portrayal of sexual conduct, and that taken as a whole it lacks any serious literary, artistic, political or scientific value. See State v. D. Burgun, supra. This assignment of error is without merit and is overruled.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JOURNALIZED March 19, 1979

PARRINO, P.J.

STILLMAN, J., CONCUR

Gerald E. Fuerst,
Clerk of Courts

By /s/ Peggy Moguel
Deputy

/s/ Alvin I. Krenzler
Judge

Appearances: ALVIN I. KRENZLER

For Plaintiff-Appellee: Almeta A. Johnson

For Defendant-Appellant: Bernard A. Berkman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DALENE BURGUN,	:	C79-1900
Petitioner	:	
-vs-	:	MEMORANDUM OPINION AND ORDER
THE CLEVELAND MUNICIPAL COURT AND THE HONORABLE FRANK G. O'BELL	:	[Entered Nov. 24, 1980]
and	:	
THE ATTORNEY GENERAL OF THE STATE OF OHIO, WILLIAM J. BROWN,	:	
Respondents	:	

Battisti, C.J.

Dalene Burgun was convicted for pandering obscenity under O.R.C. §2907.32. Having exhausted available state remedies, Burgun seeks a writ of habeas corpus in this Court. She alleges that her conviction was obtained and sentence imposed under a statutory scheme repugnant to

the First and Fourteenth Amendments. Specifically, the petitioner asserts, as she did in the Cleveland Municipal Court, the Ohio Court of Appeals, and the Ohio Supreme Court, that O.R.C. §2907.32, which proscribes pandering obscenity, and O.R.C. §2907.01(F), which defines obscenity, are unconstitutionally vague and overbroad, and cannot serve as the predicate for her conviction. The application is denied.

I

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court established guidelines for the states to follow in regulating obscenity. Noting that any state regulation of obscene materials must be carefully limited, the court confined "the permissible scope of such regulation to works which depict or describe sexual conduct." Id. at 24.

The Court then set forth three basic guidelines for the trier of fact:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

By way of illustration, the court offered "a few plain examples of what a state statute could define for regulation under part (b) of the standard...," id. at 25:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of

the genitals."

In Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state statute which was overbroad on its face but which had been "authoritatively construed" by the Illinois Supreme Court to incorporate the Miller guidelines. The statute in question defined "obscene" as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

In People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974), the Illinois Supreme Court, on remand of an earlier judgment for reconsideration in light of Miller, had construed the statute to

incorporate parts (a) and (b) of the Miller standard, while retaining the "utterly without redeeming social value" standard of Memoirs v. Massachusetts, 383 U.S. 413 (1966), in preference to the less stringent criterion of part (c) of Miller. Although the Illinois court did not expressly define the kinds of sexual conduct the description or depiction of which was proscribed, the United States Supreme Court concluded that

> The Illinois court plainly intended to conform the Illinois law to part (b) of Miller, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the Miller examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its

statute by refusing to take cognizance of the specificity requirements set down in Miller. Ward, 431 U.S. at 767.

The question before this Court is whether the Ohio obscenity statute, as written or authoritatively construed, conforms with the requirements of Miller.

II

On its face, O.R.C. §2907.01(F), which defines the obscene materials the pandering of which is proscribed by O.R.C. §2907.32, is unconstitutionally vague and overbroad. Section 2907.01(F) provides:

> When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" of any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest,

> when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

As Judge Manos of this Court concluded in Sovereign News Co. v. Falke, 448 F.Supp. 306(N.D. Ohio 1977), remanded sub nom. Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), "in four separate instances §2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression." 448 F.Supp. at 400.[1] Judge Manos

1. Specifically, Judge Manos concluded:

First: Section 2907.01(F)(1)(2)(3)(4) and (5) fail to incorporate the three-part Miller test. The Miller test is a conjunctive three-part test, all parts of which must be satisfied before the material may be found obscene. However, under Ohio Revised Code §2907.01 material may be found obscene without the state being required to prove each of the three parts of Miller... An example of this is §2907.01(F)(1) which defines as "obscene," material whose "...dominant appeal is to prurient interest." Under Subsection (F)(1),

concluded that §2907.01 did "not lend

---

1 cont.
the Miller requirements that (b) the material be "patently offensive" and (c) that, "taken as a whole, it lacks serious literary, artistic, political or scientific value," need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code §2907.01(F), to be found to be obscene. The Court concludes that Ohio R.C. §2907.01 restricts material which is not 'obscene', making the statute overbroad.

Second: Section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violance unconstitutionally restrains free expression, and the statute is therefore overbroad.

Third: Sections 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simply nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene... Therefore the court finds §2907.01 (F)(1)(2)(3)and (5) are overbroad in that they restrict non-hardcore sexual conduct.

itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it." Id., at 405.

Nevertheless, on December 7, 1978, the Ohio Supreme Court in State v. Burgun, 56 Ohio St. 2d 354 (1978), held that §2907.01(F)

> is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety

---

1 cont.

Fourth: Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction.

448 F. Supp. at 400 (footnotes omitted).

> shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit. 56 Ohio St.2d at 361.

It was in light of this decision of the Ohio Supreme Court that the Sixth Circuit Court of Appeals remanded Sovereign News to Judge Manos for further consideration. 610 F.2d 428 (6th Cir. 1979).

Recently, Judge Thomas of this Court has concluded that O.R.C. §2907.01, as construed by the Ohio Supreme Court in State v. Burgun, supra, is constitutional. Turoso v. Cleveland Municipal Court, et al., (C79-1010, N.D. Ohio, September 15, 1980). Respondents have requested that Judge Thomas' Memorandum and Order be included in the record of this action and be treated as persuasive authority.

Despite the fact that the Ohio Supreme Court did not explicitly incorporate the explanatory examples of Miller, Judge Thomas, "applying the teachings of Ward v. Illinois", concludes that

> "by expressly incorporating the Miller guidelines into O.R.C. 2907.01 (F) with full knowledge of the Miller 'examples' the Ohio Supreme Court has impliedly incorporated the Miller 'examples' as well." Turoso, slip op. at 17.

This, it is concluded, is sufficient to save the statute from the charge that it is unconstitutionally vague and overbroad, just as the facially invalid Illinois statute was similarly saved in People v. Ridens, supra. As the Supreme Court remarked in Ward, supra, 431 U.S. at 776,

> "[s]ince it is plain enough from its prior cases and from its response to

Miller that the Illinois court recognizes the limitations of the kinds of sexual conduct which may not be represented or depicted under the obscenity laws, we cannot hold the Illinois statute to be unconstitutionally overbroad."

The same must be said of the Ohio Supreme Court. Although the court did not explicitly define the kinds of sexual conduct which may not be depicted or described under Ohio's obscenity law, it did indicate its awareness of the Miller examples, and must be held to have implicitly incorporated them into the Ohio statute. That statute, as authoritatively construed, is therefore constitutional and can properly serve as the predicate for the petitioner's conviction.

Dalene Burgun's petition for habeas corpus is denied.

IT IS SO ORDERED.

/s/Frank J. Battisti

Frank J. Battisti

Chief Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

DALENE BURGUN,	)	
	)	
Petitioner	)	
	)	
-vs-	)	C79-1900
	)	
THE CLEVELAND MUNICIPAL COURT AND THE HONORABLE FRANK G. O'BELL	)	
	)	
and	)	
	)	
THE ATTORNEY GENERAL OF THE STATE OF OHIO, WILLIAM J. BROWN,	)	JUDGMENT ENTRY
	)	[Entered Nov. 24,
Respondents	)	1980]

Battisti, C.J.

In accordance with the Memorandum Opinion and Order filed on November 24, 1980,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Dalene Burgun's petition for habeas corpus is denied.

/s/ Frank J. Battisti
Frank J. Battisti, Chief Judge

CERTIFICATE OF PROBABLE CAUSE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DARLENE BURGUN	:	C79-1900
Petitioner	:	
-vs-	:	O R D E R [Entered Dec. 9, 1980]
THE CLEVELAND MUNICIPAL COURT, et al.,	:	
Respondents	:	

Battisti, C.J.

Upon consideration, petitioner's application for a certificate of Probable Cause for Appeal is granted.

IT IS SO ORDERED.

/s/ Frank J. Battisti

Frank J. Battisti

Chief Judge

ORDER OF THE OHIO SUPREME COURT

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1979 TERM
)	
City of Columbus.)	To Wit: September 13, 1979
State of Ohio,)	No. 79-765
Appellee,)	
)	APPEAL FROM THE
vs.)	COURT OF APPEALS
)	
Dalene Burgun,)	for Cuyahoga County
Appellant.)	

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the

Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of

_____19_____.

_____Clerk

_____Deputy

ORDER OF THE OHIO SUPREME COURT

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1979 TERM
)
City of Columbus.) To Wit: September 13, 1979

State of Ohio,) No. 79-765
)
Appellee,) MOTION FOR AN ORDER
) DIRECTING THE COURT
vs.) OF APPEALS
)
Dalene Burgun ,) for Cuyahoga County
)
Appellant.) TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Berkman, Gordon, Kancelbaum, Levy and Murray .

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this____day of_____19___.

_____Clerk

_____Deputy

OPINION OF OHIO COURT OF APPEALS

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 37574

STATE OF OHIO, CITY OF CLEVELAND	APPEAL FROM
APPELLEE	CLEVELAND MUNICIPAL COURT
-vs-	No. 75 CRB 27810
DALENE BURGUN	JOURNAL ENTRY AND OPINION
APPELLANT	

DATE: April 5, 1979

KRUPANSKY, J.:

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and

upon review the following disposition made:

The within matter is an appeal by Dalene Burgun, defendant-appellant (appellant), from her conviction for pandering obscenity pursuant to R.C. 2907.32(A)(2).

On November 3, 1976, Cleveland Police Officers Bernard Jones entered the "Bookstore" located at 693 East 185th Street in Cleveland, Ohio. Appellant was behind the cash register in the middle of the store. Officer Jones examined various magazines offered for sale in the rear portion of the store and selected Volume No. 4 of "Deviant Sex," a magazine sealed in a plastic cover. He took the magazine to the cashier's counter and paid appellant $7.92. Appellant placed the magazine in a paper bag and Jones exited the store.

Jones was on police business and was dressed as a plainclothesman at the time he entered the store and made the purchase. He didn't have a search warrant nor did he identify himself as a police officer to appellant at the time of the purchase.

Officer Jones filed a complaint the next day and appellant was arrested. Trial was held in the Cleveland Municipal Court on February 7, 1977 and a jury of eight found appellant guilty of pandering obscenity.

Appellant assigns ten assignments of error on appeal:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS THE MAGAZINE BECAUSE THE PURCHASE OF SUCH MAGAZINE BY A PLAINCLOTHES POLICE OFFICER VIOLATED DEFENDANT'S RIGHTS GUARANTEED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. THE TRIAL JUDGE ERRED BY ADMITTING INTO EVIDENCE THE PHOTOGRAPHS OF THE PREMISES FROM WHICH THE MAGAZINE WAS PURCHASED.

III. DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN TWO PHOTOGRAPHS OF THE INTERIOR OF THE PREMISES FROM WHICH THE MAGAZINE AT ISSUE WAS PURCHASED WERE TAKEN WITHOUT A SEARCH WARRANT.

IV. and V. THE COMPLAINT AND THE CHARGE TO THE JURY WERE DEFECTIVE IN THAT THE MATERIAL ELEMENT THAT DEFENDANT HAVE KNOWLEDGE OF THE CONTENT OF THE MAGAZINE WAS NOT ALLEGED IN THE COMPLAINT AND THE JURY WAS NOT INSTRUCTED ON THE NECESSITY OF PROOF OF SUCH KNOWLEDGE.

VI. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE TESTIMONY BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME.

VII. THE STATUTE PURSUANT TO WHICH THE DEFENDANT WAS CHARGED AND CONVICTED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

VIII. THE INSTANT PROSECUTION VIOLATED DEFENDANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS BECAUSE THE UNCONSTITUTIONALITY OF REVISED CODE §2907.35(C), WHICH IMMUNIZED SIMILARLY SITUATED PRJECTIONISTS FROM PROSECUTION FROM REVISED CODE §2907.32, REQUIRES THE INVALIDATION OF REVISED CODE §2907.32, WHICH WAS ENACTED AT A TIME WHEN THE LEGISLATURE KNEW IT WOULD BE READ IN CONJUNCTION WITH REVISED CODE §2907.35(C).

IX. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE SIZE OF THE COMMUNITY THEY WERE TO CONSIDER WHEN DETERMINING COMMUNITY STANDARDS.

X. THE MAGAZINE IN ISSUE IS NOT LEGALLY OBSCENE.

In her first assignment of error appellant contends the purchase of a magazine by a plainclothes police officer violated her constitutional rights guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution. We do not agree.

The magazine in issue was purchased in the ordinary course of business in a store open to the public. The police officer tendered the purchase price of the magazine to the cashier, who willingly completed the sale by accepting the money, placing the magazine in a paper bag, and handing the bag to the police officer. Although the police officer was in plainclothes and had not revealed his identity,

there was nothing in the record which indicates an unreasonable seizure of the magazine occurred. Rather, the police officer obtained the magazine in a totally voluntary business transaction, freely and willingly entered into by appellant in the ordinary course of business.

In State v. Minnekar (1971), 17 Ohio St. 2d 155, 160-161, the Ohio Supreme Court stated the following:

> "'A search ordinarily implies a quest by an officer of the law, a prying into hiden places for that which is concealed; and that a seizure connotes a forcible dispossession of the owner.' (Emphasis supplied.) State v. McCarthy (1971), 26 Ohio St. 2d 87, citing Weeks v. United States (1914), 232 U.S. 383, 397."

There is nothing contained in the record to indicate Officer Jones was "prying into hidden places for that which is concealed" or that there was a "forcible dispossession." Officer Jones

purchased a magazine openly displayed on a magazine rack in a portion of the store open to the public. He paid the full purchase price of the magazine in a voluntary business transaction, thereby obtaining possession of it from the store without the use of force or coercion.

In Lewis v. United States (1966), 385 U.S. 206, the petitioner claimed his Fourth Amendment rights had been violated when a plainclothes police officer purchased drugs from him in his home. The United States Supreme Court held the use of an undercover federal narcotics agent did not violate the petitioner's constitutional rights, stating as follows:

> "In the instant case, on the other hand, the petitioner invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price.***

During neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business. Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest. * * *

"The fact that the undercover agent entered petitioner's home does not compel a different conclusion. Without question, the home is accorded the full range of Fourth Amendment protections. * * * But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner

> as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the Gouled case, supra, is sufficient to dispose of that contention." Lewis v. United States, supra, at 100-111. (Emphasis added)

Appellant contends the use of a plainclothes police officer in First Amendment cases is impermissible. Appellant cites Roaden v.Kentucky (1973), 413 U.S. 496, and A Quantity of Copies of Books v. Kansas (1964), 378 U.S. 205, to support this contention.

These cases are distinguishable from the instant matter. In Roaden v. Kentucky, supra, a county sheriff seized an allegedly obscene movie and arrested the manager after viewing the movie at a drive-in

theater, without first obtaining a warrant. In A Quantity of Copies of Books v. Kansas, supra, 1,715 copies of 31 paperback novels were seized and impounded prior to any adversary hearing to determine whether they were obscene material pursuant to a warrant. There was no purchase or voluntary transfer of possession as in the instant matter. The magazine at issue in this case was purchased by a plainclothes police officer in the ordinary course of buisness. This does not constitute an unreasonable seizure of evidence. Nor does Officer Jones' action constitute a prior restraint on expression as in Roaden v. Kentucky, supra, and A Quantity of Copies of Books, supra, since he had taken only the single magazine he had purchased from the store. He seized no other materials.

We find Officer Jones' purchase of the magazine, displayed in plain view and held out to general public for sale, in a voluntary business transaction by appellant, did not constitute an unreasonable seizure.

There was no unreasonable search and seizure of the magazine as appellant contends. Therefore, the first assignment of error is not well taken.

In her second assignment of error appellant contends the trial court erred in admitting three photographs of the premises into evidence. State's Exhibit 1 was a photograph of the exterior of store and State's Exhibits 2 and 3 depicted portions of the interior of the store. These photographs were taken by Officer Jones twelve days after his purchase of the magazine from appellant.

The Ohio Supreme Court set forth the requirements for admission of photographs

into evidence as follows:

> "The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray." State v. Woodards (1966), 6 Ohio St. 2d 14, 24-25.

The record discloses a proper foundation was laid for the admission of State's Exhibits 1 and 2. However, Officer Jones failed to testify that State's Exhibit 3 was a fair and accurate representation of the interior of the store as it appeared on November 3, 1976. The court, therefore, erred in admitting this photograph into evidence.

The photograph depicts the entrance to movie booths located in the rear portion of the store. A portion of the magazine display racks also appears in the photograph. We note that Officer Jones testified that the rear portion of the

store contained " . . . a series of peep show booths." (Tr. 7) He also testified to the nature of the magazines displayed in the rear portion of the store.

We have reviewed State's Exhibit 3 and find that its admission into evidence did not prejudice appellant's right to a fair trial. Its admission into evidence, without a proper foundation being laid, was harmless error.

Appellant contends the prejudicial effect of the photographs taken by Officer Jones outweighed any probative value they may have had.

The photographs show the physical appearance of the store in which appellant worked as a cashier. They supported the police officer's testimony of the nature of the material contained within the store. The prejudicial effect, if any, the photographs might have had was slight

and was outweighed by their probative value.

The admission of photographs into evidence is a matter within the sound discretion of the trial court, and a decision by the trial court to admit photographs will not be disturbed unless it is demonstrated the danger of prejudice outweighs their probative value. State v. Hill (1967), 12 Ohio St.2d 88; State v. Woodards, supra; State v. Rivers (1977), 50 Ohio App. 2d 129.

Appellant's second assignment of error is not well taken.

In the third assignment of error appellant contends the two photographs of the interior of the store were taken in violation of her Fourth and Fourteenth Amendment rights because no search warrant was obtained to photograph the interior of the store.

Appellant relies upon Dietmann v. Time, Inc. (C.D. Calif. 1968), 284 F. Supp. 925, aff'd (9th Cir. 1971), 449 F.2d 245, in support of her contention. In Dietmann v. Time, Inc., supra, police officers arranged with employees of a magazine to surreptitiously take pictures and recordings in the private home of the plaintiff in a civil action for damages for invasion of privacy. The Federal District Court for the Central District of California held the photographs were obtained as a result of an illegal search of a private home by agents of the police.

Unlike the factual setting in Dietmann v. Time, Inc., supra, the photographs of the interior of the store were taken of an area open to the public during business hours. The interior of the store was in plain view of the police officer who had

a right to be in the store since it was open to the public.

The United States Supreme Court held in Harris v. United States (1968), 390 U.S. 234:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

Ohio courts have followed this general rule. State v. Morris (1975), 42 Ohio St. 2d 307; State v. Twitty (1969), 18 Ohio App. 2d 15.

The portions of the store photographed by Officer Jones were in open and plain view of the public and therefore were not the result of a search as contemplated by the Fourth Amendment.

The reasoning contained in Dietmann v. Time, Inc., supra, is inapplicable to a situation where photographs are taken of a public place without a warrant

since there is no expectation of privacy. The Fourth Amendment provides no protection to a store that opens its doors to the public, inviting them to enter and transact business. In Katz v. United States (1967), 389 U.S. 347, 351, the United States Supreme Court held as follows:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 US 206, 210, 17 L ed 2d 312, 315, 87 S Ct 424; United States v. Lee, 274 US 559, 563, 71 L ed 1202, 1204 47 S Ct 746."

See United States v. Dionisio (1973), 410 U.S. 1, 14; Recznik v. City of Lorain (1968), 393 U.S. 166. In the instant matter, the walls of the store were knowingly and openly exposed to the public. Therefore, taking photographs of the public portion of the portion of the interior of the store did not constitute an unreasonable search and seizure.

Appellant's third assignment of error is without merit.

Appellant contends in the fourth assignment of error the complaint was defective since it failed to allege appellant had knowledge of the content of the magazine. Appellant contends in the fifth assignment of error the court erred in failing to instruct the jury on the necessity of proving appellant had knoweldge of the content of the magazine. These two assignments of error shall be treated together.

Revised Code 2907.32(A)(2) does not require "knowledge of the content" of the alleged obscene material as an element of pandering obscenity. Rather, it requires only "knowledge of the character of the material" as an element of the crime. (Emphasis added)

The Ohio Supreme Court was presented with this identical issue in State v.

Burgun (1978), 56 Ohio St. 2d 354. That court held as follows:

> "As indicated by the statutory language, 'precise knowledge' of 'contents' is unnecessary and instead the emphasis is on 'notice' of the 'nature' of the material.
>
> "Knowledge of the 'character' or 'nature' of obscene material has been held to be a constitutionally adequate indicium of scienter to uphold an obscenity conviction. [Citations omitted] In light of the foregoing we conclude that 'knowledge of the character of the material' is sufficient to sustain a conviction under R.C. 2907.32 (A)(4)."

In the instant matter, the complaint alleged appellant sold the magazine with ". . . knowledge of the character of the material involved. . . ." The trial judge instructed the jury that they must find appellant had ". . . knowledge of the character of the magazine. . ." (Tr. 68) to support a conviction under R.C. 2907.32(A)(2). Both the complaint and the jury instruc-

tions were sufficient and correctly stated the required degree of knowledge found in R.C. 2907.32(A)(2).

Appellant's fourth and fifth assignments of error are not well taken.

In her sixth assignment of error appellant contends the trial court erred in denying appellant's motion for judgment of acquittal on the basis that the state failed to prove appellant's knowledge of the character and content of the magazine. We do not agree.

As stated in our discussion of appellant's fourth and fifth assignments of error, knowledge of the content of the magazine is not an element of R.C. 2907.32(A)(2) and need not be proven by the prosecution.

In the syllabus of State v. Bridgeman (1978), 55 Ohio St. 2d 261, the Ohio Supreme Court held the following:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

The record discloses reasonable minds could reach different conclusions as to whether appellant's knowledge of the character of the magazine was proved beyond a reasonable doubt. Therefore, the trial court did not err in denying appellant's motion for judgment of acquittal.

Appellant's sixth assignment of error is without merit.

In her seventh assignment of error appellant contends the definition of obscenity contained in R.C. 2907.01(F) is unconstitutionally overbroad and vague in light of the additional requirements enunciated by the United States Supreme Court in Miller v. California (1973),

413 U.S. 15.

In State v. Burgun (1978), 56 Ohio St. 2d 354, 356-362, the Ohio Supreme Court upheld convictions for pandering obscenity in situations in which the jury was instructed under the Ohio statute and the three-prong test laid down in Miller v. California, supra. The court held as follows:

> "We hold that R.C. 2907.01 (F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an 'authoritative' state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit." State v. Burgun (1978), 56 Ohio St. 2d at 361. See, State v. Burgun

(1976), 49 Ohio App. 2d 112, 122-124.

In the instant matter the trial judge instructed the jury on both the statutory definition of obscenity (Tr. 70-72) and the test laid down in Miller v. California, supra (Tr. 72-73).

Appellant's seventh assignment of error is without merit.

Appellant contends in her eighth assignment of error that she has been denied the equal protection of the laws since movie projectionists are given an exemption from prosecution under R.C. 2907.31 and R.C. 2907.32 if they have no ". . .managerial responsibilty or financial interest in [their] place of employment, other than wages." R.C. 2907.35(C).

In State v. Burgun (1976), 49 Ohio App. 2d 112, 124-127, this court held R.C. 2907.35(C) is unconstitutional and

R.C. 2907.32 is still valid and in full force and effect. Since the defense given to projectionists in R.C. 2907.35 (C) is no longer available, appellant was not denied her equal protection of the laws.

Appellant's eighth assignment of error is without merit.

In her ninth assignment of error appellant contends the trial court erred in failing to instruct the jury as to the size of the community to consider in determining community standards. We do not agree.

The United States Supreme Court held the following in Jenkins v. Georgia (1974), 418 U.S. 153, 157:

> "A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in Miller without further specification, as was done here, or it may choose to define the standards

in more precise geographic terms as was done by California in Miller."

It was not error for the court to instruct the jury to apply "community standards" without defining the size of the community. Appellant's ninth assignment of error is without merit.

In her tenth assignment of error appellant contends the magazine, "Deviant Sex," Vol. 4, is not legally obscene. However, after examining the entire magazine and applying the statutory definition of obscenity contained in R.C. 2907.01(F) and the standards of Miller v. California (1973), 413 U.S. 15, we find the magazine is obscene as a matter of law, beyond a reasonable doubt.

Appellant's tenth assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STILLMAN, P.J. and

PATTON, J. CONCUR

JOURNALIZED Apr. 16, 1979
Gerald E. Fuerst,
Clerk of Courts
By/s/Peggy Moguel
Deputy

/s/Blanche Krupansky
JUDGE
BLANCHE KRUPANSKY

For plaintiff-appellee: Almeta A. Johnson
For defendant-appellant: Bernard A. Berkman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

WILLIAM LEE Petitioner v. THE CLEVELAND MUNICIPAL COURT AND THE ATTORNEY GENERAL OF THE STATE OF OHIO Respondents.	)	CIVIL ACTION CASE NO. C79-474 [Entered Jan. 29, 1981]

MEMORANDUM AND ORDER

This case is before the Court on review of the Report and Recommendation of the Magistrate.

Petitioner contends that §§2907.01 and 2907.32, Ohio Revised Code, are overbroad and vague and that his conviction under these statute denied him his rights as

guaranteed by the First and Fourteenth Amendments. Specifically, the petitioner objects to the Magistrate's finding that §2907.01(F) of the Ohio Revised Code satisfies the constitutional standard for defining obscenity as set forth in Miller v. California, 413 U.S. 15 (1973).

The Magistrate agrees with petitioner's contention that the language of §2907.01 (F) is unconstitutionally overbroad and vague. However, the Magistrate found that, although §2907.01 (F) is vague and overbroad on its face, the statute's defects were cured by judicial construction as rendered by the Ohio Supreme Court in State v. Burgun, 56 Ohio St. 2d 354 (1978), reh. denied (January 17, 1979).

In Burgun, the Ohio Supreme Court held that the definition of obscenity contained §2907.01 (F) is not unconstitutional when

construed to incorporate the Miller guidelines. The Ohio Supreme Court approved as constitutionally valid a conviction where the trial court's jury instructions combined §2907.01 (F) with the Miller guidelines.

However, it is the holding of this Court that the addition of the three-prong Miller formula to the statute is not sufficient to cure the statute's constitutional defects.

In Miller, the United States Supreme Court set forth three basic guidelines for defining obscenity:

> (a) Whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24.

The second guideline in Miller, (b), requires that the proscribed sexual depictions be defined specifically by state law. Section 2907.01 fails to so specify, and the Miller formula itself does not provide any "specific proscribed sexual depictions." Hence, even when read in conjunction with the Miller guidelines, §2907.01 is unconstitutional. This Court finds the opinion in Sovereign News v. Falke, No. C77-230 (N.D. Ohio, Sept. 19, 1980), on remand from Sovereign News v. Corrigan, 610 F.2d 428 (6th Cir. 1979), to be persuasive on this issue. The Court therefore finds Ohio Revised Code §§2907.01 and 2907.32 void for vagueness and overbreadth. Petitioner's application for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ Ann Aldrich
UNITED STATES DISTRICT JUDGE

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

William Lee	)	
	)	
Petitioner	)	
	)	Civil Action
vs	)	
	)	Number C79-474
The Cleveland	)	
Municipal Court,	)	
et al.	)	O R D E R
	)	[Entered Jan. 29,
Respondents	)	1981]

The Court has reviewed the report and recommendation of the magistrate and the objection to the report. The Court having filed its memorandum and order finding Ohio Revised Code §§2901.01 and 2901.32 void for vagueness and overbreadth and granting petitioner's application for a writ of habeas corpus, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure.

IT IS ORDERED that Ohio Revised Code

§§2907.01 and 2907.32 are found to be void for vagueness and overbreadth.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus is hereby granted and his conviction is overturned.

/s/ Ann Aldrich
ANN ALDRICH, U.S.
DISTRICT JUDGE

REPORT OF THE MAGISTRATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM LEE	)	CASE NO. C79-474
	)	
Petitioner,	)	Judge Ann Aldrich
	)	
vs.	)	REPORT AND RECOMMENDATION OF
	)	MAGISTRATE
THE CLEVELAND MUNICIPAL COURT	)	
AND THE ATTORNEY GENERAL OF THE STATE OF OHIO	)	Magistrate Charles R. Laurie
	)	
	)	[Entered Sept. 30,
Respondents.	)	1980]

Petitioner, William Lee, initiated this action for habeas corpus relief pursuant to 28 U.S.C. §2254 on March 14, 1979. United States District Court Judge Leroy J. Contie, Jr. referred the case to this Magistrate for a report containing proposed findings of fact, conclusions of law, and a recommended disposition of the case. The case has since been transferred from Judge Contie's docket to Judge Aldrich's docket, but remains with this Magistrate for a report and recommendation.

HISTORY OF PROCEEDINGS

On December 3, 1976, petitioner was arrested and charged with one (1) count of pandering obscenity in violation of Ohio Revised Code Section 2907.32(A)(4). Petitioner entered a plea of not guilty and went to trial before a jury on April 11, 1977, in Cleveland Municipal Court. The jury returned a guilty verdict, and the court sentenced petitioner to sixty (60) days in the workhouse and imposed a fine of five hundred dollars. State v. Lee, 76 CRB 30237 (Cleveland Mun. Ct. 1977).

Petitioner perfected an appeal to the Cuyahoga County Court of Appeals, Eighth Judicial District, presenting the following assignments of error:

1. The statute pursuant to which the defendant was charged and convicted is unconstitutionally overbroad and vague.

2. The trial court erred in failing to grant defendant's motion to suppress the film and projector

because the seizure of these items violated defendant's constitutional rights.

3. The complaint and the charge to the jury were defective in that the material element that defendant have knowledge of the content of the film was not alleged in the complaint and the jury was not instructed on the necessity of proof of such knowledge.

4. The trial court erred in denying defendant's motion for acquittal at the close of all the testimony because the state failed to prove an essential element of the crime.

5. The instant prosecution violated defendant's right to equal protection of the laws because the unconstitutionality of revised code §2907.35(C), which immunized similarly situated projectionists from prosecution from revised code 2907.32, requires the invalidation of revised code §2907.32, which was enacted at a time when the legislature knew it would be read in conjunction with revised code §2907.35(C)

6. The trial court erred in failing to instruct the jury on the size of the community they were to consider when determining community standards.

7. The film in issue is not legally obscene.

The Court of Appeals overruled each assignment of error and affirmed petitioner's conviction. State v. Lee, No. 37926 (C.A. Cuyahoga Co. 1979). Petitioner did not pursue an appeal to the Supreme Court of Ohio.

Petitioner is now before the United States District Court for the Northern District of Ohio, Eastern Division, seeking relief in federal habeas corpus. As grounds for relief, petitioner sets forth the following allegation:

> The statutes under which I was charged and convicted are unconstitutional under the First and Fourteenth Amendments, in that they are unconstitutionally vague and overbroad.

LAW AND ARGUMENT

I

Respondent contends that petitioner has failed to exhaust available state remedies as required by 28 U.S.C. §2254 (b,c) and, therefore, that his petition should be dismissed. In support of this

contention respondent claims that petitioner has available an appeal to the Ohio Supreme Court followed by direct appeal to the United States Supreme Court.

Respondent's argument is without merit and should be rejected. Section 2254(b) requires a habeas corpus petitioner to exhaust all available state remedies unless circumstances exist which render such remedies ineffective to protect the rights of the petitioner. In Lucas v. Michigan, 420 F. 2d 259 (6th Cir. 1970), the Sixth Circuit Court of Appeals ruled that such circumstances do exist where the state courts have previously ruled contrary to petitioner's position and there is no indication that the state courts are prepared to depart from the former decisions. Lucas, supra, at 261.

In the present case, petitioner was convicted of pandering obscenity under Ohio Revised Code Section 2907.32(A)(4)

which refers to Section 2907.01(F) for the definition of obscenity. Petitioner attacked his conviction in the Cuyahoga County Court of Appeals on the grounds that the definition of obscenity found in Section 2907.01(F) violates the First and Fourteenth Amendments of the United States Constitution in that the definition is both overbroad and vague.

During the pendency of this appeal, the Ohio Supreme Court handed down its decision in the case of State v. Burgun 56 Ohio St. 2d 354 (1978). The defendants in the Burgun case had been convicted under Section 2907.32(A)(4) and had argued that the definition of obscenity in Section 2907.01(F) was both overbroad and vague in violation of the First and Fourteenth Amendments. In Burgun, the Ohio Supreme Court clearly and unequivocally held Section 2907.01(F) to be neither unconstitutionally overbroad nor void for

vagueness when construed to incorporate the guidelines of Miller v. California, 413 U.S. 15 (1973). Burgun, supra, at 354.

When the Cuyahoga County Court of Appeals issued its decision in petitioner's case on February 22, 1979, it expressly relied upon the Burgun case. State v. Lee, No. 37926 (C.A. Cuyahoga Co. 1979). Less than one month after the Court of Appeals' decision in petitioner's case, the Ohio Supreme Court reaffirmed its holding that Section 2907.01(F) is neither overbroad nor vague. State v. Thomas, 57 Ohio St. 2d 71 (1979).

In both Burgun and Thomas the defendants, like petitioner, had been convicted under Section 2907.32(A)(4). In both cases the defendants, like petitioner, had attacked the definition of obscenity in Section 2907.01(F) as unconstitutionally overbroad and vague. In both cases

the Ohio Supreme Court ruled quite plainly that the section is neither overbroad nor vague when construed in conjunction with Miller. This Magistrate has no reason to believe that the Ohio Supreme Court will depart from this position if presented with a case that is factually and legally identical to Burgun and Thomas. Requiring petitioner to return to the Ohio Supreme Court in this case would, without question, be an exercise in futility. As the Sixth Circuit Court of Appeals has held, "[s]uch a judicial run-around is not mandated by the statute providing for exhaustion of State remedies". Lucas, supra, at 262.

This Magistrate finds that under the circumstances of this case 28 U.S.C. §§ 2254(b,c) do not require that petitioner pursue an appeal to the Ohio Supreme Court before seeking federal habeas corpus on the grounds presented in his petition. Furthermore, although respondent would

have petitioner take a direct appeal to the United States Supreme Court, such has never been required of a habeas petitioner by statute or case law. It is, therefore, recommended that the District Court not dismiss the petition for failure to exhaust state remedies.

II

Ohio Revised Code Section 2907.32(A)(4), under which petitioner was convicted, provides as follows:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
> (4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged...

The definition of "obscene," as the word is used in Section 2907.32(A)(4), is provided in Section 2907.01(F) as follows:

> (F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially

susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions or elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such in interest is primarily for its own sake or for commercial exploitation, rather than

primarily for a genuine scientific, educational, sociological, moral or artistic purpose (Emphasis added).

In Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio E.D. 1977), Judge John M. Manos held the definition of obscenity found in Section 2907.01(F) as written to be both unconstitutionally overbroad and vague. The Court included in its opinion a very thorough summary of the law relating to state regulations of obscene expression, particularly the case of Miller v. California, 412 U.S. 15 (1973). The Miller Court laid down the following mandatory components for any state regulatory scheme:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeal to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. Miller, supra, at 24.

In applying Miller to Ohio Revised Code Section 2907.01(F) as drafted, the District Court in Sovereign News found four areas in which the statute was overbroad:

> First: Section 2907.01(f)(1)(2)(3)(4) and (5) fail to incorporate the three-part Miller test. The Miller test is a conjunctive three-part test, all parts of which must be satisfied before the material may be found obscene... However, under Ohio Revised Code §2907.01 material may be found obscene without the state being required to prove each of the three parts of Miller. An example of this is §2907.01(f)(1) which defines as 'obscene' material whose '...dominant appeal is to prurient interest.' Under Subsection (f)(1), the Miller requirements that (b) the material be 'patently offensive' and (c) that, 'taken as whole, it lacks serious literary, artistic, political or scientific value,' need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code §2907.01(f)(1), be found to be obscene. The Court concludes the Ohio R.C. §2907.01 restricts material which is not 'obscene', making the statute overbroad.
>
> Second: Section 2907(f)(3) unconstitutionally restricts the display

or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S. Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

Third: Section 2907.01(f)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(f). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene...Therefore, the court finds §2907.01(f)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

Fourth: Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the type of sexual conduct to be restricted, and therefore, may be applied to the depiction of sexual conduct not subject to restriction. Sovereign News, supra, at 400, 406.

Following the District Court's decision in Sovereign News, the Ohio Supreme Court also considered the constitutionality of Section 2907.01(F). In State v. Burgun, 56 Ohio St. 2d 354 (1978), the Ohio Supreme Court held that the statutory definition of obscenity is not unconstitutional when construed to incorporate the three Miller criteria. In Burgun, the Ohio Court approved as constitutionally valid jury instructions combining Section 2907.01(F) with the three Miller tests. According to the Ohio Supreme Court, this hybrid instruction effectively narrowed the regulatory scope of Section 2907.01 (F) to constitutionally permitted parameters. Burgun, supra, at 361. On December 7, 1979, the Sixth Circuit Court of Appeals remanded the Sovereign News case to the District Court for further consideration in light of Burgun. Sovereign News Company v. Corrigan, Nos.

78-3064-66 (6th Cir. 1979).

Although petitioner's trial occurred more than a year before the Burgun decision, the trial court used the same type of jury instruction which the Ohio Supreme Court upheld in Burgun. The trial court in petitioner's case presented the following definition of obscenity to the jury:

> When considered as a whole and judged with reference to ordinary adults or if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is obscene if any of the following apply:
>
> One, its dominant appeal is to prurient interest;
>
> Two, its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;
>
> Three, its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

Four, its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, education, sociological, moral or artistic purpose;

Fifth, it contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, education, sociological, moral or artistic purpose.

'Sexual Conduct', is defined as follows: Sexual conduct means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons, regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

'Sexual excitement', is defined as follows: Sexual excitement means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

In addition to the statute which I have read to you, which defines the term 'obscene', the following

additional factors must be taken into consideration to determine obscenity. According to the United States Supreme Court, the basic guidelines for the trier of facts must be:

A. Whether the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to his prurient interest.

B. Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable State law.

C. Whether the work, taken as a whole lacks serious literary, artistic, political or scientific value.

All three of these factors must be considered by you in order to find that the film involved in this case is obscene. You must find beyond a reasonable doubt that all three of these factors are present in this case.

This Magistrate concludes that Section 2907.01(F), as applied by the trial court, satisfies the constitutional requirements set forth in Miller. As the District Court pointed out in Sovereign News, the statute fails to incorporate the three conjunctive Miller standards. However,

the definition of obscenity given to the jury in petitioner's trial did include all three criteria. The trial court specifically instructed the jury that all three of the factors had to be proven beyond a reasonable doubt before it could find the film obscene. As the District Court also pointed out, Section 2907.01 (F) as written classified material as obscene on the basis of violence and non-active sexual conduct such as simple nudity. The definition applied by the trial court in its jury instructions specifically required the jury to find patently offensive depictions or descriptions of sexual conduct; and, as required by Miller, the court provided the statutory definition of sexual conduct. Given this instruction, the jury could not base a finding of obscenity absent the constitutionally mandated showing of patently offensive, active sexual conduct. Thus,

violence or nudity alone could not form the basis for an obscenity conviction. Finally, the District Court found that Section 2907.01(F)(1) failed to specifically define the sexual acts which may be considered in deciding the issue of obscenity. In petitioner's case, however, the trial court included in the jury instruction the very specific definition of sexual conduct provided in Section 2907.01(A).

This Magistrate fully agrees with the District Court's opinion in Sovereign News that Section 2907.01(F), as written, is unconstitutionally overbroad. Petitioner's case is distinguishable, however, in that the trial court required the jury to apply the three Miller standards in its deliberation. These jury instruction -- by including the three part Miller test, by limiting a finding of obscenity to patently offensive depictions of

sexual conduct, and by providing the specific statutory definition of sexual conduct -- clearly limit the scope of Section 2907.01(F) to constitutionally permissable bounds.

This Magistrate, therefore, respectfully recommends that the District Court deny and dismiss petitioner's application for habeas corpus.

/s/Charles R. Laurie
CHARLES R. LAURIE
UNITED STATES MAGISTRATE

CERTIFICATION

I hereby certify that a copy of the foregoing instrument was forwarded to Attorneys Bernard A. Berkman and J. Michael Murray, Attorneys for the Plaintiff, 2121 The Illuminating Bldg., 55 Public Square, Cleveland, OH 44113 and to Mr. Richard David Drake, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus,

OH 43215, and to Mr. Bruce A. Taylor, Attorney for Defendant, 440 Leader Bldg., Cleveland, OH 44114, this 30th day of September, 1980, by regular United States Mail.

/s/ Charles R. Laurie
CHARLES R. LAURIE
UNITED STATES MAGISTRATE

OPINION OF THE OHIO COURT OF APPEALS

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 37926

STATE OF OHIO, CITY OF CLEVELAND	APPEAL FROM
APPELLEE	Cleveland Municipal Court
-vs-	No. 76 CRB 30237
WILLIAM LEE	JOURNAL ENTRY AND OPINION
APPELLANT	

DATE FEB. 22, 1979

KRENZLER, P.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On December 3, 1976, police officer

officer John McNamara of the Cleveland Police Department entered an adult bookstore at 1813 East 13th Street, where appellant William Lee was employed as a cashier or clerk. The police officer viewed a film in a booth with a coin-operated projector and drew up an affidavit describing the sexual activity displayed on the screen. The affidavit was presented to a municipal court judge who issued the requested search warrant authorizing seizure of the film and projector. The items were seized and appellant was arrested and charged with pandering obscenity in violation of R.C. 2907.32 (A)(4).

On April 11, 1977, the appellant was brought to trial before a jury and, on April 12, the jury returned a verdict of finding the appellant guilty of pandering obscenity. Appellant was fined $500.00 and sentenced to sixty days in the

workhouse. Execution of the sentence was stayed pending appeal and bond was set at $1,000.00.

The appellant filed a timely notice of appeal from his conviction of pandering obscenity, and presents the following assignments of error:

I. THE STATUTE PURSUANT TO WHICH THE DEFENDANT WAS CHARGED AND CONVICTED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS THE FILM AND PROJECTOR BECAUSE THE SEIZURE OF THESE ITEMS VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS.

III & IV. THE COMPLAINT AND THE CHARGE TO THE JURY WERE DEFECTIVE IN THAT THE MATERIAL ELEMENT THAT DEFENDANT HAVE KNOWLEDGE OF THE CONTENT OF THE FILM WAS NOT ALLEGED IN THE COMPLAINT AND THE JURY WAS NOT INSTRUCTED ON THE NECESSITY OF PROOF OF SUCH KNOWLEDGE.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE TESTIMONY BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME.

VI. THE INSTANT PROSECUTION VIOLATED DEFENDANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS BECAUSE THE UNCONSTITUTIONALITY OF REVISED CODE §2907.35(C), WHICH IMMUNIZED SIMILARLY SITUATED PROJECTIONISTS FROM PROSECUTION FROM REVISED CODE §2907.32, REQUIRES THE INVALIDATION OF REVISED CODE §2907.32, WHICH WAS ENACTED AT A TIME WHEN THE LEGISLATURE KNEW IT WOULD BE READ IN CONJUNCTION WITH REVISED CODE §2907.35(C).

VII. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE SIZE OF THE COMMUNITY THEY WERE TO CONSIDER WHEN DETERMINING COMMUNITY STANDARDS.

VIII. THE FILM IN ISSUE IS NOT LEGALLY OBSCENE.

In the first assignment of error, appellant contends that Ohio's definition of obscenity contained in R.C. 2907.01(F) is both overbroad and vague in violation of the First and Fourteenth Amendments. The Ohio Supreme Court recently held that "R.C. 2907.01(F), which sets forth the definitions of 'obscenity', is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines

prescribed in Miller v. California, 413 U.S. 15." State v. Burgun (1978), 56 Ohio St. 2d 354.

Because the trial judge in the case at bar instructed the jury under the Ohio statute and, in addition, gave the jury a "narrowing" instruction restricting the definition of obscenity to the tests set forth in Miller, the first assignment of error is not well taken.

Appellant's second assignment of error asserts that the film and projector were seized in violation of his constitutional rights guaranteed by the First, Fourth and Fourteenth Amendments, and that the film and projector should have been suppressed.

Appellant first argues that the warrant pursuant to which the film was seized was invalid as the affidavit in support thereof was insufficient to establish probable cause that a crime was being committed. Where a judge issues a warrant

based on information appearing on the affidavit without having viewed the film, the affidavit must "stand or fall on its own right based upon whether it contains sufficient information to enable the magistrate to focus searchingly on the question of obscenity" in light of the standards provided in Miller v. California, supra. State v. Ronald Burgun (Cuy. Cty., Aug. 18, 1977), Case No. 36078, reversed on other grounds, 56 Ohio St. 2d 354. We find that the description contained in Officer McNamara's affidavit for a search warrant was sufficient to satisfy each of the three standards of the Miller test, and enabled the magistrate to consider the film as a whole and determine whether the film lacked serious literary, artistic, political, or scientific value. After viewing the film, we find that the description completely and accurately described its contents. See, State v.

Bayless (Cuy. Cty., July 21, 1977), Case No. 36264. Therefore, we find that the affidavit enabled the magistrate to "focus searchingly on the question of obscenity."

Appellant also contends that his First and Fourth Amendment rights were violated in that the judge who issued the warrant had not been shown the film prior thereto. It is not mandatory that a judge view a film prior to the issuance of a search warrant, as long as the affidavit contains sufficient facts to authorize a constitutionally sufficient warrant and allows the judge to "focus searchingly on the question of obscenity" in light of the Miller test. State v. Burgun (1978), 56 Ohio St. 2d 354; State v. Turoso (Cuy. Cty., April 8, 1976), Case No. 34623. Therefore, the second assignemtn of error is overruled.

In appellant's third and fourth assignments of error, he alleges that the

complaint and charge to the jury were defective in that they failed to allege the material element that appellant have knowledge of the film's content. It has been held, however, that knowledge of the character of the material is sufficient to sustain a conviction under R.C. 2907.32(A)(4). State v. Burgun (1978), 56 Ohio St. 2d 354; State v. Dalene Burgun (1976), 49 Ohio App. 2d 112. The third and fourth assignments of error are not well taken.

In his fifth assignment of error, appellant asserts that his motion for a judgment of acquittal should have been granted as the state failed to prove knowledge of content and character of the film. Knowledge of content is not an element of the offense of pandering obscenity and therefore, need not be proven by the state. State v. Burgun (1978), 56 Ohio St. 2d 354; State v.

Dalene Burgun, supra.

A court may not grant a motion for judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261. As reasonable minds could have differed as to whether knowledge of the character of the film had been proved beyond a reasonable doubt, the trial court was correct in overruling appellant's motion for a judgment of acquittal. The fifth assignment of error is overruled.

Appellant's sixth assignment of error argues that the finding of unconstitutionality of R.C. 2907.35(C) requires the invalidation of R.C. 2907.32, the statute under which appellant was convicted. Although this court has held R.C. 2907.35 (C) to be unconstitutional as violative

of the equal protection clause of the Fourteenth Amendment, we upheld R.C. 2907.32 as being valid and of full force and effect. State v. Dalene Burgun, supra. Appellant's sixth assignment of error is not well taken.

In his seventh assignment of error, appellant argues that a jury must be instructed as to the size of the community to consider when determining community standards. This assignment of error is without merit as it is permissible for a trial court to instruct jurors to apply "community standards" without further specification. Jenkins v. Georgia (1974), 418 U.S. 153.

Appellant's final assignment of error is that the film in question is not legally obscene. In determining whether or not material is obscene, the court must apply the three factors set forth in Miller v. California, supra, as well as

Ohio's definition of obscenity contained in R.C. 2907.01(F). State v. Dalene Burgun, supra. After viewing the film in question, this court concludes that the film, taken as a whole, appeals to prurient interest; that it depicts sexual conduct in a patently offensive way, and that, taken as a whole, lacks any serious literary, artistic, political or scientific value.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

Exceptions.

KRUPANSKY, J.,

PATTON, J., CONCUR

JOURNALIZED MAR. 5, 1979
GERALD E. FUERST,
Clerk of Courts
By /s/Peggy Moguel
Deputy

/s/Alvin I. Krenzler
PRESIDING JUDGE
ALVIN I. KRENZLER

Appearances:

For Plaintiff-Appellee: Almeta A. Johnson

For Defendant-Appellant: Bernard A. Berkman

ORDER DENYING REHEARING

Nos. 80-3696, 3728, 3742, 3743, 3817 and 81-3127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK TUROSO,
Petitioner-Appellee
(80-3742/3),
Petitioner-Appellant
(80-3696),
LAURA SPIKER,
Petitioner-Appellee
(80-3728)
DALENE BURGUN,
Petitioner-Appellant
(80-3817)
WILLIAM LEE,
Petitioner-Appellee
(81-3127),

v.

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, RICHARD M. BRENNAN, FRANK O'BELL and WILLIAM J. BROWN,
Respondents-Appellees
(80-3696)(80-3817),
Respondents-Appellants
(80-3728, 3742, 3743 and 81-3127)

O R D E R

[Entered Apr. 15, 1982]

Before: ENGEL and MERRITT, Circuit Judges; and HOGAN, District Judge.*

*Hon. Timothy S. Hogan, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Petitioners-Appellees and Petitioners-Appellants have filed herein a petition for rehearing with a suggestion that the petition be heard by the court sitting en banc. Less than a majority of the judges of this court who are in regular active service of this court having favored rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. Upon consideration, it appearing that the petition presents no issues which have not already been fully considered by the court,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Judge Merritt would grant the rehearing for the reasons set forth in his dissenting opinion previously filed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ORDER STAYING MANDATE

Nos. 80-3696
80-3728
80-3742
80-3743
80-3817
81-3127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK TUROSO, Petitioner-Appellee (80-3742/3) Petitioner-Appellant (80-3696), LAURA SPIKER, Petitioner-Appellee (80-3728), DALENE BURGUN, Petitioner-Appellant (80-3817), WILLIAM LEE, Petitioner-Appellee (81-3127),	:	
v.	:	O R D E R
THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, RICHARD M. BRENNAN, FRANK O'BELL and WILLIAM J. BROWN,	:	[Entered May 10, 1982]
Respondents-Appellees (80-3696) (80-3817), Respondents-Appellants (80-3728, 3742, 3743, and 81-3127)	:	

Motion having been made by the petitioners-appellee/appellants, and it appearing to the Court that a petition

for writ of certiorari would not be frivolous or filed merely for delay,

IT IS HEREBY ORDERED that the issuance of the mandate shall be stayed pursuant to Fed. R. App. P. 41(b) and local rule 15 for a period of thirty days. If during the period of the stay there is filed the notice required by Rule 41(b), the stay shall continue until final disposition by the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman/cg
John P. Hehman, Clerk

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive

and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to

support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial

before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of

habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

§2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpous in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights

of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the wirt and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall

otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequatley developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full,fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has

been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support

such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

OHIO REVISED CODE §2907.01

§2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether

the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description,

or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of

sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an

interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture,

figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or alimony;

(3) In the case of an action for alimony, after the effective date of the judgment for alimony.

OHIO REVISED CODE §2907.32

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance,

when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section

2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.